The Central Law Journal.

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CURRENT EVENTS.

THE PARDONING POWER.—We learn from the *Albany Times* that there is now pending in the legislature of New York a bill to provide for the summoning of witnesses and the production of books and papers in any matter arising before the governor upon an application for executive clemency. The bill gives to the governor powers in effect equivalent to those of courts of law, in the matter of procuring the attendance of witnesses, the taking of depositions, the services of referees, and, in effect, establishes in the gubernatorial chamber a court of mercy, the very highest of all human courts, emphatically and absolutely *the* court of last resort.

Not having seen the bill, the provisions of which are recited by the *Times*, we can, of course, express no opinion as to the wisdom of its provisions. Its general design, however, is very praiseworthy, and it is not a little remarkable that a system of this sort has not long ago been generally adopted. From the very beginning the administration of justice has been fenced around and about with an indefinite detail of procedure, of forms and ceremonies, checks and balances, while the administration of mercy has been left to caprice, chance, accident and to the varying enterprise of sympathizing friends.

In a recent number of the JOURNAL[1] we had occasion to treat this subject incidentally and, among other things, to call attention to the vague, indefinite and often unreliable data upon which governors are frequently obliged to act, and upon which they do act, sometimes to the grievous discredit of public justice.

It is sad, however, to reflect that there is another side to this question, and that from poverty, insignificance, want of friends or gross mismanagement, culprits who really deserve mercy, fail to receive it. Such cases are, we believe, rare, but their existence and the infliction of undue or excessive punishment, is a reproach to the law, only palliated by the rarity of the cases and the necessary imperfection of all human institutions.

There are incorporated in the laws of some of the States provisions for pardoning boards, composed of several official personages, including, of course, the governor, whose duty it is to consider and act upon applications of this character. We are not informed as to the practical working of this system, but regarding the matter only from a theoretical point of view, our first impression is decidedly in favor of the proposed New York plan. The pardoning board divides a responsibility which should rest upon a single head, and its members can too easily shift the blame of unrighteous decisions upon each other, and are in no respect likely to feel as vividly as a single officer the obligations of duty to the public on the one hand and to the culprit on the other. However this may be, there can be no doubt that the system (or more properly, perhaps, the *no system*) prevalent in most of the states needs amendment, and New York would do well to lead the way.

Howsoever the court of mercy may be constituted, each case must depend upon its own merits. upon its extenuating facts and circumstances. No fair and reasonable generalization will be practicable — the court cannot easily formulate rules of decision to which it will conform. It can hardly be expected that, in the exercise of the pardoning power, the governor will permit his free action to be fettered by undue regard to forms of procedure or recognition of precedent, although that seems to be the ordinary characteristic of persons endowed with judicial or *quâsi* judicial functions. It is in every respect highly desirable that, when the governor of a State is called upon to exercise the pardoning power, or to decide whether he will do so, that he should have every facility necessary to the due discharge of his duty intelligently, that he be enabled to command the production of any testimony that he may desire to hear, and of any documents which he may think will furnish him assistance in forming his conclusion. For these facilities he should not be dependent upon accident, or courtesy, or the exertions of the petitioner or his friends. For the discharge of his duty in this matter, as in other re-

[1] 24 Cent. L. J. 49.

spects, the State should provide all neeessary and expedient appliances.

The *Albany Times*, after commentiug on the distress to which governors are often subjected by applications for executive clemency, concludes its article by saying:

"It is, therefore, a matter of the merest justice, the most evident expediency, that he should have the means at hand to form from evidence a true estimate of a case before him. At present no witness need come before the executive unless he chooses to do so. There is no provision for the payment of expenses or for the taking of testimony at a distance. The only attendance which can be enforced —and that is merely the enforcement by official courtesy—is that of a district attorney or a judge, persons who in many cases, having presided or prosecuted, are against mercy to a prisoner, which would imply a reversal of their findings."

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT, ETC.—JUDICIAL NOTICE—LAWS OF ANOTHER STATE—JURISDICTION.—In the Supreme Court of the United States there was recently a case of much interest, involving the above-named subjects.[1] The facts were that both parties are Illinois corporations, that they contracted with each other that the defendant should transport across the Mississippi river passengers and freight brought to that river by or for the plaintiff, and that the plaintiff should always employ the defendant to transport such freight and passengers. The railroad company having, as alleged, violated this agreement, the ferry company brought this suit in a Missouri State court, and after being adjudicated in the Supreme Court of Missouri, the case was brought up by the railroad company by writ of error. The federal question involved was, whether the Supreme Court of Missouri gave "full faith and credit to the public acts, records and judicial proceedings of Illinois."

The defense of the railroad company in the court below was, in effect, that the agreement "always" to employ the ferry company was *ultra vires*, against public policy, and void. It did not appear by the record that any testimony had been given as to whether, by any law, usage or decision of Illinois it had been settled that the railroad company could, or could not, make such a contract as that in question. Upon the question of jurisdiction the court said: "Without doubt the constitutional requirement (art. 4, § 1) that 'full faith and credit shall be given in each State' to the public acts, records and judicial proceedings of every other State, implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813,[2] and steadily adhered to ever since." The court proceeds to say:

"Whenever it becomes necessary, under this requirement of the constitution, for a court of one State, in order to give faith and credit to a public act of another State, to ascertain what effect it has in that State, the law of that State must be proved as a fact. No court of a State is charged with knowledge of the laws of another State; but such laws are in that court matters of fact, whieh, like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several States of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in Hanley v. Donoghue,[3] in respect to the faith and credit to be given by the courts of one State to the judgments of the courts of another State, and it is equally applicable to the faith and credit due in one State to the public acts of another."

Upon the principles thus declared by the court, it was indispensable that the party alleging that the contract under consideration was "in violation of the laws of the State of Illinois, and contrary to the public policy thereof," should produce and embody in the record evidence showing what is, on these subjects, the law and public policy of

[1] Chicago, etc. R. Co. v. Wiggins Ferry Co., U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 398.

[2] Mills v. Duryea, 7 Cranch, 481.

[3] 116 U. S. 1; 6 S. C. Rep. 242.

the State of Illinois. The courts below cannot be presumed to know that law, nor to take any judicial notice of it, unless it be duly proved as a fact, and the Supreme Court of the United States in its appellate capacity confines its knowledge to the same bounds which limit that of the courts whose judgments it reviews. As, therefore, the Supreme Court of Missouri failed to construe the law of Illinois at all, and decided upon general principles that the contract was not "*ultra vires*, condemned by public policy or in restraint of trade," its decision was not based upon anything that could give jurisdiction to the Supreme Court of the United States. "The decision would have been the same upon the case as made, whether the constitution had contained the provision relied on or not.[4] * * * This court cannot review the decision of a State court holding a contract valid or void, when 'made upon general principles by which courts determine whether a consideration is good or bad in principles of public policy.' "[5]

The court sums up the whole matter in these words:

"It must somehow be made to appear on the face of the record that the facts, as they were actually presented for adjudication, made it necessary for the court to consider and give effect to the act of incorporation, in view of some peculiar jurisprudence of Illinois, rather than the general law of the land. That, as we have seen, was not done in this case. Consequently we have no jurisdiction, and the motion to dismiss is granted."

[4] Bethell v. Demaret, 10 Wall. 537; West Tennessee Bank v. Citizens' Bank, 13 Wall. 432; Delmas v. Insurance Co., 14 Wall. 661.

[5] Tarver v. Keach. 15 Wall. 67; Rockhold v. Rockhold, 92 U. S. 129; New York Life Ins. Co. v. Hendren, *Id.* 286; U. S. v. Thompson, 93 U. S. 87; Bank v. McVeigh, 98 U. S. 333; Dugger v. Bocock, 104 U. S. 601; Allen v. McVeigh, 107 U. S. 433; s. c., 2 S. C. Rep. 588; San Francisco v. Scott, 11 U. S. 768; s. c., 4 S. C. Rep. 688; Greene v. Assurance Co., 112 U. S. 273; s. c., 5 S. C. Rep. 150.

CO-OPERATIVE SUICIDE — LIABILITY FOR MURDER OF PERSON COUNSELING OR AIDING ONE TO COMMIT SUICIDE.—The English legal journals have been recently engaged in discussing a new application of the co-operative industrial principle—to no less grave a subject than suicide. It seems that, in the late case of Regina v. Jessop, the facts were that Jessop and Alcock, being in disgrace and tired of life, resolved to die together, and, retiring to a barn, took poison at the same time. Jessop was resuscitated, but his companion's dose was effectual, and Jessop was indicted, tried and convicted of his murder.

No doubt seems to be entertained that the ruling of the court and the verdict of the jury were strictly in accordance with the law, that inducing a man to commit suicide and encouraging him in that deadly purpose by proposed and attempted co-operation is murder, but our English contemporaries are very much shocked by the fact that such should be the law, and regard it as very illogical that, when a man who having aided his comrade to take his life and attempted to take his own, should be enabled by the law, through the instrumentality of Jack Ketch, to consummate this latter felonious purpose. We think they are right in protesting against the execution of Jessop, but it manifest that he should be otherwise and severely punished, and if the law does not provide for punishment of such offense, it should be promptly amended.

The English journals all assume that a public execution would precisely meet Jessop's views by carrying out with appropriate *eclat* his original purpose. This we may be permitted to doubt; men sometimes change their minds on grave as well as upon lighter subjects. We recall the case of a young man who, being "crossed in hopeless love," shot himself and, after a week or two of deadly peril, was pronounced "out of danger." The attending physicians with one accord averred that they had never seen that gratifying announcement received by any patient with such unbounded satisfaction as by that love-lorn would-be suicide.

It seems to us that the criminal law of England is singularly defective if there existed in Jessop's case no alternative except to acquit a murderer or to hang a man whose nly desire in life was to die.

CERTIFICATES OF DEPOSIT.

Nature.—A certificate of deposit, issued by a bank, is an evidence of debt in the nature of a receipt.[1] And it is intended to represent moneys actually left with the depositor,[2] which are to be retained until the depositor actually demands them.[3] More precisely, a certificate of deposit is a writing, customarily issued by banks or bankers, giving assurance that a certain person named has deposited money with the bank, which is payable to a person named as payee, or to the order of the depositor.[4] Adjudicated cases show that certificates of deposit, bearing interest, or payable at a future date, have often been before the courts;[5] and in the absence of statutory prohibition they have not been deemed open to objection, because payable on time or with interest.[6]

Negotiability.—According to some authorities, if not generally, a certificate of deposit is negotiable if expressed in negotiable words;[7] and, so far as negotiability is concerned, must be placed on the same footing as a promissory note.[8] So a certificate of deposit payable to order, "in currency," has been held negotiable.[9] And where a certificate of deposit bore the following words written in red ink across the face: "The certificate is subject to any subsequent claim for collection or any other fees arising out of the disbursement of the legacy of which this money is part of proceeds," and the payee indorsed it in blank and delivered it, it was held that, even considering the certificate non-negotiable, the transferee might pledge it to an innocent party who would hold it against the true owner, to the amount advanced, unaffected by the equities between the transferrer and the transferee.[10]

Informal Instrument.—In accordance with the great weight of authority it is held, in Indiana,[11] that a certificate of deposit, written in full and regular form, is a promissory note, and as such negotiable.[12] And even when an instrument of like character is not written out in full, but amounts to an acknowledgment of the receipt of a deposit of money, though containing no express promise to repay it, it has been considered that it would be a promissory note, and as such negotiable, although payable on demand.[13] For it is well settled that no precise form of words is necessary to constitute a promissory note, as any form that expresses a promise, although not in direct terms, will be sufficient.[14] Thus, a written statement that a designated sum is due a person named, or a certificate that a specified sum is due a person designated, or a more general statement that a certain sum is due, is considered a promissory note, and yet in none of these instances is there an express promise to pay.[15] And the principle declared in these cases has been applied to certificates similar to that before described.[16]

[1] Hotchkiss v. Mosher, 48 N. Y. 478; Payne v. Gardiner, 29 *Id.* 146, 171. See Moore v. Ulster Bank Co., 11 Ir. Rep. C. L. 512.

[2] Nat. Bank v. Wash. Co. Nat. Bank, 5 Hun, 605.

[3] Nat. Bank v. Wash. Co. Nat. Bank, 5 Hun, 605; Boone Corp. § 225. And see Brown v. McElroy, 52 Ind. 404; Meador v. Dallas Sav. Bank, 56 Ga. 605. Compare Lang v. Straus (Ind.), 7 N. Y. Rep. 763.

[4] 1 Abb. Law Dict. 198. Compare 2 Dan. Neg. Instr. (3d. ed.), p. 703, § 698; note to O'Niell v. Bradford, 42 Am. Dec. 576.

[5] Hunt v. Appellant, etc., 6 N. E. Rep. 554 (Sup. Jud. Ct. Mass., May 7, 1886).

[6] Miller v. Austen, 13 How. 218; Kilgore v. Buckley, 14 Conn. 363; Patterson v. Poindexter, 6 Watts S. 227; London Sav. Fund Assn. v. Hagerstown Sav. Bank, 36 Pa. St. 498; Cate v. Patterson, 25 Mich. 191; Laughlin v. Marshall, 19 Ill. 350; Howe v. Hartness, 11 Ohio St. 449. See also 2 Dan. Neg. Instr. §§ 698, 1707*a*; Story Prom. Notes, § 12*u*.

[7] Nat. Bank v. Ringel, 51 Ind. 393; Johnson v. Henderson, 76 N. C. 227, and see cases in next note. Compare Lang v. Straus (Ind.), 7 N. E. Rep. 763.

[8] Welton v. Adams, 4 Cal. 37, 40; s. c., 60 Am. Dec. 579; Poorman v. Adams, 35 Cal. 118; Pardee v. Fish, 60 N. Y. 265; s. c., 19 Am. Rep. 176, 177; Boone Corp. § 225. And see Klauber v. Biggerstaff, 47 Wis. 551; s. c., 32 Am. Rep. 773; Dan. Neg. Instr. § 1703; Tripp v. Curtenius, 36 Mich. 494; s. c., 24 Am. Rep. 610, 613. But compare *contra*, O'Neill v. Bradford, 1 Pinney, 390; 42 Am. Dec. 574, and note 577; Huse v. Hamblin, 29 Iowa 501; 4 Am. Rep. 244.

[9] Klauber v. Biggerstaff, 47 Wis. 551; s. c., 32 Am. Rep. 773; Boone Corp. § 225. But see *contra*, Huse v. Hamblin, 29 Iowa 501; 4 Am. Rep. 244.

[10] International Bank v. German Bank, 71 Mo. 133; 36 Am. Rep. 468.

[11] See Lang v. Straus, 7 N. E. Rep. 763 (Sup. Ct. Ind., June 19, 1886).

[12] Gregg v. Union Co. Bank, 87 Ind. 238; Brown v. McElroy, 52 Ind. 404; National, etc. Bank v. Ringel, 51 Md. 393; Drake v. Minkle, 21 Ind. 433.

[13] Lang v. Straus, 7 N. E. Rep. 763.

[14] Lang v. Straus, 7 N. E. Rep. 763.

[15] Russell v. Whipple, 2 Cow. 536; Franklin v. March, 6 N. H. 364; Jacques v. Warren, 31 Mo. 28; Cummings v. Freeman, 2 Humph. 145; Bell v. Brewer, 6 Ga. 587, 589; Hussey v. Winslow, 59 Me. 170; Knight v. Connecticut, etc. Co. 44 Wis. 472; Fleming v. Burge, 6 Ala. 373; Draker v. Schreiber, 15 Mo. 602; Marrigan v. Page, 23 Tenn. 245.

[16] Lynch v. Goldsmith, 64 Ga. 42; Hart v. Life Assn., 54 Ala. 495.

Resemblance to Commercial Paper.—Some of the authorities hold that a certificate of deposit, in the usual form, payable to the order of the depositor, is in the nature of commercial paper,[17] and that the payee is chargeable upon an indorsement thereof;[18] but by other authorities it is regarded rather as an agreement[19] than as a promissory note.[20] And a certificate of deposit, in a particular form, has been held not to be a promissory note, within the meaning of a statute,[21] which provides that, in any action by an indorsee against the promisor upon a promissory nore, payable on demand, any matter shall be deemed a legal defense which would be a defense to a suit thereupon if brought by the promisee.[22] It has, however, been held that a certificate of deposit, payable to orders on return of the certificate properly indorsed, is in legal effect a promissory note payable on demand, and is dishonored upon the lapse of a reasonable time after its issue.[23]

Error in.—When a certificate of deposit is inadmissible as evidence for want of a proper stamp, parol evidence is admissible of the facts it recites.[24] And when a mistake is made in filling up the body of the certificate, a *bona fide* holder is entitled to recover the larger sum so inserted.[25]

Acknowledgment of Deposit. — Where an instrument contains the words "on deposit, in national currency," thus indicating the receipt of a deposit in money,[26] it may not be just what is known in the commercial world as a certificate of deposit,[27] but it is nevertheless a contract in writing, evidencing the receipt of money on deposit, to which all the legal incidents attach.[28]

Guaranty.—The indorsement of the names of third persons in blank upon the back of a certificate of deposit is *prima facie* evidence of a contract of guaranty,[29] and this is the case without regard to the negotiability of the certificates.[30] And where a guaranty is made contemporaneously with the certificate of deposit on which it is indorsed, it is not necessary that there should be a separate and distinct consideration to uphold the guaranty, as would be the case if the contract of guaranty was subsequent to the principal transaction, and not for the benefit of the guarantor.[31] In such a case the indorsement of guaranty is deemed to be given for the benefit of the maker of the instrument, and it is also considered that the promisee gave credit to the maker upon the strength of the liability of these whose promise of guaranty was written upon the back of the instrument.[32]

Limitation of Actions on.—Where a receipt for money declares that the sum named therein is "due on demand" and is especially deposited, it has been held that the instrument is not a promissory note but a certificate of deposit, and that the statute of limitations will not begin to run until a demand has been made.[33] For being a deposit

[17] Kilgore v. Buckley, 14 Conn. 363; Cate v. Patterson, 25 Mich. 191; Lindsey v. McClelland, 18 Wis. 481; Laughlin v. Marshall, 19 Ill. 390; White v. Franklin Bank, 22 Pick. 181; Cushman v. Ill. Starch Co., 79 Ill. 281. And compare Lang v. Straus (Ind.), 7 N. E. Rep. 763.

[18] Pardee v. Fish, 60 N. Y. 265; s. c., 19 Am. Rep. 176.

[19] Boone Corp. § 225.

[20] See Patterson v. Poindexter, 6 Watts & S. 227; Chamby v. Dulles, 8 *Id.* 353; Sibree v. Tripp, 15 Mess. & W. 23; Talladega Ins. Co. v. Woodward, 44 Ala. 287.

[21] Gen. Stats. Mass., ch. 53, § 10.

[22] Shute v. Pacific Nat. Bank, 137 Mass. 487. So the bank was held not to be entitled to defend an action brought by the indorsee to recover the amount of the certificate, by setting off a debt due to the bank from the original depositor: *Ibid.* See Hunt v. Appellant, etc. 6 N. E. Rep. 554 (Sup. Jud. Ct. Mass., May 7, 1886).

[23] Tripp v. Curtenius, 36 Mich. 494; s. c., 24 Am. Rep. 610, 613. And that any person taking it after such reasonable time has elapsed takes it subject to the equities between the parties to it. *Ibid.*

[24] Leach v. Hale, 31 Iowa 69; s. c., 7 Am. Rep. 112, 116.

[25] Poorman v. Mills, 39 Cal. 345; s. c., 2 Am. Rep. 451. And compare Payne v. Clarke, 59 Am. Dec. 333.

[26] See Phelps v. Toun, 14 Mich. 373.

[27] Lang v. Straus, 7 N. E. Rep. 763 (Sup. Ct. Mo., June 19, 1886).

[28] Lang v. Straus, 7 N. E. Rep. 763. And it is by no means certain whether it is not a regular certificate of deposit. *Ibid.*

[29] Fuller v. Scott, 8 Kan. 25; Finnan v. Blood 2 Kan. 496.

[30] Jones v. Kuhn, 8 Pac. Rep. 777 (Sup. Ct. Kan., Dec. 4, 1885).

[31] Jones v. Kuhn, 8 Pac. Rep. 777. But the considerations upon which the certificate of deposit was executed is sufficient to sustain the written promise of guaranty which was indorsed upon the certificate before its delivery. *Ibid.*

[32] Gilligan v. Boardman, 29 Me. 79; Campbell v. Knapp, 15 Pa. St. 27; Bichford v. Gibbs, 62 Mass. 154; Colburn v. Averill, 30 Me. 310; Manrow v. Durham, 3 Hill, 584; Purdy v. Peters, 35 Barb. 239.

[33] Smiley v. Fry, 3 N. E. Rep. 186; N. Y. Ct. App. Oct. 30, 1885, since reported, 100 N. Y. 262. So the right to sue a bank upon a general deposit does not accrue, nor the statute of limitations upon it begin to run until a demand of payment, unless the demand is

a demand of the money was essential to a right of action, unless there was a wrongful conversion or loss by some gross negligence on the part of the depository.[34] According to some authorities, however, the statute of limitations begins to run against a banker's certificate of deposit, payable on demand, from the date of the same, and no special demand is necessary to put the statute in motion.[35]

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in some way dispensed with. Branch v. Dawson, 23 N. W. Rep. 552.

[34] Smiley v. Fry, 100 N. Y. 262. "The distinction between a deposit and a loan is considered in Payne v. Gardiner, 29 N. Y. 146, and within the rule there laid down the instrument in question was a certificate of deposit, and in such a case no indebtedness arose by reason of such deposit until a demand was made for the amount deposited." *Ibid.* See also Howell v. Adams, 68 N. Y. 314; Boughton v. Flint, 74 N. Y. 476; Lang v. Straus (Ind.), 7 N. E. Rep. 763, 766.

[35] Brummagim v. Tallant, 29 Cal. 503. And see Tripp v. Curtenius, 36 Mich. 494; s. c., 24 Am. Rep. 610, 614. But see note to O'Neill v. Bradford, 42 Am. Dec. 578, 579.

HELPING LITIGANTS WITH MONEY.

The list of pauper litigants, or rather of persons who are too poor—at least not rich enough—to sue for their rights, probably embraces one-fourth of the human race. It is plain that there are, and always will be, a vast number of people who never get justice in any shape or form; no purse is long enough to overtake much of this work. It is hopeless to expect it; and most of us must do the other thing—namely, put up with a very small fragment of what we are ever likely to get or see done, according to the way in which affairs are managed. Such may be said to be the common case. There are however, at the same time, many cases constantly coming before one's eyes and sufficiently close to our business and bosoms, where one is either desirous to ask or to receive a little help in what may be called a reasonably hopeful case—that is to say, one which there is a chance of winning. Few people can avoid in such a case doing something either out of friendship or neighborly feeling, or any of the mixed motives which govern the actions of daily life. Even justices of the peace sometimes feel their blood boiling within them at the glimpses they get of some gross injustice lying behind many of the cases they have to deal with. And the question comes to be, What is the best and safest thing to do? How much or how little any one can do, or can do with safety, becomes a troublesome question, and may well perplex even judges and justices of all degrees. There is a bugbear called the doctrine of maintenance, which says that it is dangerous to assist litigants, or something to that effect. Moreover, if justices of the peace do anything of that kind with similar motives, their judgment may be upset on the ground of interest. There are pitfalls on all sides which are very difficult to escape, when one is impelled to render assistance to those embarking in litigation.

In a case of *Ex parte Chamberlain*,[1] an interesting and instructive episode in justices' justice occurred about twenty years ago in the county of Norfolk. One day a woman applied to the justices for an affiliation order, and the defense set up by the putative father was by no means uncommon—namely, that it was somebody else who was really the putative or rather the real father. The mother was very roughly cross-examined, and the circumstances awakened compassion in one of the justices, who was at last so shocked that, in the middle of the case, he declared that the woman ought to have a solictor in such an unequal contest, and that he himself was ready to subscribe for the purpose. He also got others to do the same. The case was at once adjourned, and the same justice wrote to a solicitor instructing him to appear in defense or support of the woman's case. It appeared that this justice gave to the solicitor no opinion at all about the merits nor entered into details, but merely helped her in this way with money. The case was afterwards heard and decided in favor of the woman, the justice being one of those who sat on the bench. The putative father appealed; but before the appeal was heard an astute adviser suggested that they might at once get rid of the decision by a *certiorari* to quash it, on the ground of the justice being interested. This course was taken. The judges of the Queen's Bench, however, instead of quashing the decision, expressed great approbation of the judicious and compassionate conduct of the justice. The judges said that a magistrate might very

[1] 34 J. P. 773.

well act as this one had done without the least bias, partiality, or prejudice, and merely from a desire for justice. The champions of the putative father were thus effectually defeated.

These things, as one of the judges observed, must of course be done judiciously, so as not to make one a partisan. But there must be many occasion on which one can assist litigants without being caught on the horns of any dilemma. Some decisions of late on the subject of maintenance enable us to comprehend rather more clearly than formerly the limits of this doctrine, which has so long been much more feared than understood. Fortunately the latest cases go very fully into the subject, and there is much learning to be found, though much of it is antiquarian.

The doctrine of champerty and maintenance seems founded on the notion that, for a stranger to embark in a suit and make it his own, is *prima facie* unlawful, and such conduct requires at least some explanation in order to justify it. It seems that the law takes notice of the inherent desirableness of a quiet and contented life, and hence those who stir up strife and live and move amid storms should be shunned, and if possible put in prison. But, on the other hand, there is high authority for most people asking themselves "Who is my neighbor?" and between these two rules many are apt to become confused. But the law, or what is called law, must be obeyed, whatever it may be; and the difficulty is always to discover how far a rule of law may be or has been carried out.

Without going further back than 1873, in the case of Hutley v. Hutley,[2] an agreement of a not uncommon kind relating to pauper litigation gave rise to a defense of champerty. A relative of both parties had died, and a will stood in the way of some of the relatives. It was at last agreed that the plaintiff should take steps to dispute the will, and advance money for the purpose of paying the solicitor, and then the defendant promised to go halves with the plaintiff in whatever amount was thereby realized. The defendant, when sued for breach of contract, set up the defense of champerty, and the court held the defense good, and the judgment of Lord Campbell in Sprye v. Porter,[3] was quoted, where that judge said: "The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury, and to a perversion of justice."[3]

Blackburn, J., said that the agreement in Sprye v. Porter,[4] was not merely to obtain evidence, but to supply evidence sufficient to insure success. But in the case then pending the mischief was just as great, and though the parties were related, yet blood relationship was no defense, nor did it matter that the person who advanced money was mistaken in supposing he had an interest in the subject-matter of the suit.

Another instance of maintenance occurred in Metropolitan Bank v. Poole,[5] where a bank rupt sued a person for maliciously procuring his bankruptcy. But it was held that, even if the defendant had no interest in the suit, still the cause of action, if any, had passed to the trustee in bankruptcy, and so the bankrupt had no remedy.

A notable case also on this subject was that of Bradlaugh v. Newdigate.[6] The plaintiff had sat and voted as a member of parliament without having made and subscribed the oath appointed by 29 & 30 Vict. c. 19. The defendant, who was also a member of parliament, procured one Clarke to sue the plaintiff for the penalty imposed by the statute for contravention. Clarke had no sufficient means to pay the costs in the event of the action being unsuccessful; so, after the action was commenced, the defendant, Newdigate, gave to Clarke a bond of indemnity against all costs and expenses which he might incur in consequence of the action. The action by Clarke, as it afterwards turned out, was one which would not lie, and, therefore, the plaintiff, Bradlaugh, brought this action for maintenance against the defendant. The court held that Clarke had no common interest in the result of the action for the penalty, and that the conduct of the defendant in respect of the action amounted to maintenance. In that case, one question was, whether the action for maintenance was not now altogether obsolete; but the judge, Lord Coleridge, C. J., said that the old doctrine remained unaffected by all the changes in procedure, and

[2] L. R. 8 Q. B. 112.

[3] 7 E. & B. 81.

[4] *Supra.*

[5] 10 App. C. 210.

[6] 11 Q. B D. 1.

that an action for maintenance was sometimes the only remedy for most cruel wrongs. He mentioned a series of cases which established this result, namely, that to bind oneself, after the commencement of a suit, to pay the expenses of another in that suit, more especially if that other be a person himself of no means, and the suit be one which he cannot bring, is still, as it always was, maintenance. And in judging of the cause of action, it was not necessary to prove in the popular sense what was called a bad motive in the maintenance, for it was enough that it was against good policy and justice. At the same time, if there is a common interest between the maintainer of the suit and the litigant who is maintained—that is to say, if there is an actual valuable interest, then that which would otherwise amount to maintenance would be no maintenance. The instances of this kind of common interest, as stated in that case, are in themselves interesting to be known. These were said to be the relation of master and servant; of an heir-at-law; of a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right he would otherwise lose. In that case of Bradlaugh v. Newdigate,[7] the court held that an action for maintenance by one member of parliament lay against another member who instigated a stranger to sue and thereby keep the other out of his rights.

The recent case of Harris v. Brisco is, perhaps, the most interesting of all the examples of the law of maintenance, inasmuch as it almost defines what is charity, and whether one must always be discreet and exceptionally wise in giving it before one can be exempt from the odious charge of maintenance. The plaintiff brought an action for maintenance against the defendant on the following grounds: One Nailer was at one time the occupier, and undoubtedly entitled to the equity of redemption of a farm which he had mortgaged to the plaintiff. The plaintiff, as mortgagee, had bought this equity from Nailer and allowed Nailer to remain in occupation for a time. But at last Nailer was turned out of occupation by the plaintiff. Nailer thought he was unjustly so turned out, and that the sale had been obtained by fraud. The defendant took this view also, and assisted Nailer in bringing his action against the plaintiff. But Nailer was unsuccessful, and his action was dismissed with costs, and these costs amounted to 118*l*. For this sum the plaintiff sued the defendant, on the ground that the defendant had been guilty of maintenance, and the defense set up was that all that the defendant had done to assist Nailer was out of mere charity, believing that Nailer was oppressed and had no means of obtaining redress. The question thus raised was, whether one is to be liable in this way for helping a poor oppressed man, even though the defendant may have made a mistake in thinking that there was any oppression. The judge, Wills J., who first decided the point, said he was bound to consider the circumstances under which the assistance was given to the litigant, and he was of opinion that he who helps a litigant was always bound to inquire and satisfy himself about the probabilities of the case. Here the defendant had made no inquiry at all as to the character of either of the two litigant parties, though a very small amount of inquiry and a very little trouble would have satisfied him that Nailer's antecedents were not reliable. Nailer had charged his antagonist with fraud, and yet when that was investigated there was no fraud. Accordingly, Wills, J., ended by holding that he who aided a litigant ought to be discreet and aid only those who deserved it, otherwise he must take the consequences. In short, it came very much to this, that he who maintains another in his suit must take care always that the suit must succeed—a conclusion which, to those who have much to do with litigation, seemed a very austere view indeed.

Fortunately the court of appeal took a more humane view of the glorious uncertainties of the law. The lords justices, having acquired their insight into the law through much tribulation, knew that no sagacity or skill can foresee the end of a litigation, and that a man is not to be put down as a litigious, factious and subversive sower of strife merely because the litigation of which he was sanguine had come to grief. The court of appeal, in short, still believes that there may be such a thing as pure charity, and that it

[7] *Supra.*

ought not to be punished with costs for not guessing well and judging like an unerring lawyer. The result of this case is that one who aids a litigant is not bound to be either omniscient or over prudent, but that he may, without blame, aid a poor brother now and then and think no evil; and if he do so he certainly ought not always to be visited with costs whenever the litigation which he helped ends adversely.—*Justice of the Peace, Eng.*

LIABILITY OF STOCKHOLDERS IN NATIONAL BANKS—TRANSFER OF STOCK.

WHITNEY'S EXECUTORS v. BUTLER.

Supreme Court of the United States, November 1, 1886.

1. *National Banks — Individual Liability of Shareholders—Transfer of Stock.*—The individual liability of shareholders in national banks, imposed by U. S. Rev. Stats. §§ 5152, 5157, continues until the stock is transferred on the books of the bank according to its by-laws, or until the shareholder has done everything that is required or him as preliminary to such transfer, and nothing remains to be done, except for some officer of the bank to make the necessary formal entries on its books.

2. *Same—Delivery of Stock to President.*—Defendants caused their stock to be sold at public auction, giving to the brokers a power of attorney to sell and to make the necessary transfer. The stock was bought by one acting as agent for the president of the bank, who purchased with a view to filling an order from a customer. The certificates, power of attorney, and other papers were delivered to the president. *Held*, that the responsibility of the defendants ceased upon the surrender of the certificates to the bank and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser.

In error to the Circuit Court of the United States for the District of Massachusetts.

Mr. Justice HARLAN delivered the opinion of the court:

The plaintiffs in error are the personal representatives of Leonard Whitney, who, at the time of his death, held two certificates for fifty shares, each of the capital stock of the Pacific National Bank of Boston. That bank suspended on November 18, 1881, and from that date until March 18, 1882, was in charge of an examiner of national banks. On the day last named, with the permission of the comptroller of the currency, it resumed business and so continued until 20, 1882, when it failed, and was placed by that officer in the hands of a receiver to be wound up. At the time the receiver took possession, as well as when this action was brought, March 14, 1883, the above shares of stock stood in the name of Whitney on the books of the bank.

This suit was brought against the executors of Whitney, pursuant to the orders of the comptroller of the currency. It is based upon those provisions of the statute which declare that the shareholders of national banking associations shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements, to the extent or amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; and that estates and funds in the hands of executors of persons holding stock shall be liable, in like manner to the same extent, as the testator would have been if living. R. S., §§ 5157, 5152. The assessment by the comptroller upon shareholders to meet the bank's debt was for the full amount authorized by the statute.

The defendants insist that they were not shareholders of the bank, and did not hold, nor were entitled to hold, any certificates of shares of its capital stock, either at the date of its suspension or when the receiver was appointed, or when the assessment was made by the comptroller. This defense was overruled, and the executors of Whitney were adjudged to be liable, the circuit judge observing: "This being a suit brought by the receiver, who represents the creditors, and it appearing that the stock was not transferred on the books of the company, as provided by the by-laws, we think the defendants liable."

The question before the court is whether, under the statute and the facts specially found, the defendants were liable to be assessed for the contracts, debts and engagements of the bank. The statute declares that the capital stock of a national bank shall be transferable on its books in such manner as may be prescribed in the by-laws or articles of the association—every person becoming a shareholder by such transfer succeeding, in proportion to his shares, to all the rights and liabilities of the prior holder. R. S., § 5189. The by-laws of this bank provide that its stock should be assignable only on its books, subject to the restrictions and provisions of the statute; that a transfer-book be kept, in which all assignments and transfers of stock should be made; that each certificate should state upon its face that the stock is transferable on the books of the bank; and that when a transfer is made the certificate shall be returned and cancelled, and a new one issued. Whether these by-laws were so far complied with as to release the defendants as executors from the liability imposed by statute, depends upon the effect to be given to certain acts of the executors and of the president of the bank in connection with the rule of the stock standing in Whitney's name.

It appears from the special finding of facts that Abner Coburn, of Maine, desiring to buy two hundred and fifty shares of the stock of this bank, made a special deposit in it of $25,000, to be applied for that purpose. This fact appears from a letter addressed to him by Benyon, the president of the bank, under date of September 21, 1881, in which the latter said: "Yours of 20th received

with check $25,000, which we will use pending the purchase of our stock, and will hold on your account, as a special deposit, securieties to the same amount, till we succeed in making the purchase. This leaves the amount in your control until invested, and, I trust, will be satisfactory to you." That the stock might be obtained, Benyon secured the services of one Eager, who had a deposit account with the bank; and that the latter might have money with which to buy the stock, Benyon placed to his credit, as a temporary loan, out of the funds of the bank, the exact amount required for the purchase.

On November 8, 1881, the defendants—having no reason whatever to believe that the bank was insolvent, or was about to become so, on the contrary, believing it to be solvent, and having no information as to Coburn's order—placed the certificates held by them in the hands of Day & Co., brokers, with directions to sell the stock. They also placed in their hands a power of attorney in the form usually adopted for transfers of stock. It was blank as to the names of the attorney and the purchaser, but was signed by the executors and duly witnessed. It was in these words: "Know all men by these presents, that, for value received, we, the executors of the estate of Leonard Whitney, of Watertown, do hereby make, constitute and appoint, irrevocably, ——— true and lawful attorney (with power of substitution), for and in our name and our behalf to sell, assign and transfer unto ——— one hundred shares, now standing in the name of L. Whitney, of Watertown, Mass., in the capital stock of the Pacific National Bank; and said attorney is hereby fully empowered to make and pass all necessary acts for the said assignment and transfer. Witness our hands and seals." To that power of attorney was appended the following: "For value received, I appoint, irrevocably, —— as my substitute, with all the powers above given to me. Witness —— hand and seal, ———, 187-. ——— ———. [Seal.]" The other papers were the two certificates of stock and the certificate from the proper probate court, showing the appointment and qualification of the defendants as executors. Each stock certificate contained the following words: "Transferable only on the books of the said bank, in person or by attorney, on surrender of this certificate."

On November 12, 1881, Day & Co. offered the stock for sale at public auction, and the same was, at Benyon's request, bought by Eager at the sum of $10,4000. Three days thereafter, November 15, 1881, Eager offered to the brokers in payment for the stock his check on the Pacific National Bank. The bank at which the brokers did business declined to take that check in its deposit account. Benyon being informed of that fact, substituted for the check of Eager a cashier's check on another bank, which last check being paid, Day & Co., with the knowledge of Eager, delivered to Benyon, the president of the bank, the foregoing certificates of stock, with the power of attorney, the certificate from the probate court, and other papers—he thereafter holding the same "as purporting to be security for, and as representing said loan, awaiting the filling of Coburn's order, with the design then to have the stock transferred to him as soon as his order had been filled." On the 16th of November the defendants received from the brokers the proceeds of the sale of the Whitney stock. Benyon obtained only fifty additional shares, for the purpose of filling the order of Coburn. All this happened before the bank suspended on November 18, 1881.

The executors of Whitney did not know by whom the stock was bought at the auction sale, unless the knowledge of the brokers is to be imputed to them. Believing in good faith, and having no reason to doubt that the purchaser had caused the transfer to be made, neither they nor the brokers took steps to ascertain whether it had, in fact, been done.

They had no knowledge or information until after the appointment of the receiver as to the purpose for which either Benyon or Eager held the before-mentioned papers or the stock.

While the bank did not purchase nor intend to purchase the stock for itself, its president, in execution of Coburn's order, procured Eager to buy this stock with funds furnished him for that purpose. Coburn did not take it; and the receiver, after he took possession, found the before-mentioned papers in an envelope purporting to represent a security for a demand loan to Benyon.

We do not think that the question arising upon these facts is concluded by any of the cases cited in the opinion of the circuit judge, or in those cited in the brief for the receiver. In nearly all of them, where the issue was between the receiver, representing the creditors, and the person standing on the register of the bank as a shareholder, it is said, generally, that the creditors of a national bank are entitled to know who, as shareholders, have pledged their individual liabliity as security for its debts, engagements and contracts; that if a person permits his name to appear and remain in its outstanding certificates of stock, and on its register, as a shareholder, he is estopped, as between himself and the creditors of the bank, to deny that he is a shareholder; and that his individual liability continues until there is a transfer of the stock on the books of the bank, even where he has in good faith previously sold it and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made. Some of the cases hold that the seller is liable as a shareholder, even where the buyer agreed to have the transfer made on the books of the bank, but fraudulently or negligently failed to do so. But it will be found, upon careful examination, that, in no one of the cases in which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates herefor to the bank itself, accompanied (where

such surrender was not by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register. The position of the seller, in such case, is analogous to that of a grantor of a deed deposited in the proper office to be recorded. The general rule is, that the deed is considered as recorded from the time of such deposit. 2 Washb. on Real Prop., B. 3, ch. 4, par. 52. Where the seller delivers the stock certificate and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer, the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can do to effect a transfer on the stock register.

In the case before us the personal presence of the defendants at the bank was not required in order to secure their release from liabiliy as shareholders. Besides, the certificates of stock authorized them to act by attorney. Through their agents, the brokers, who sold the stock, and through whom they received the money paid for it, they surrendered the certificates and power of attorney to the president of the bank—he receiving them, with knowledge not only that defendants had parted with all title to the stock and had been paid for it, but, also, that it had been purchased at public auction by Eager. He knew equally well that the surrender of the certificates and the delivery of the power of attorney and the certificate from the probate court could only have been for the purpose of having it appear, by means of a transfer on the books of the bank, that Whitney's executors were no longer shareholders. The right to have the transfer made, and thereby secure exemption from further responsibility, was secured to the defendants both by the statute and by the by-laws of the bank. They did all that was required by either as preliminary to such transfer. Nothing remained to be done except for some officer of the bank to make the necessary formal entries on its books. If, when the agents of defendants delivered the certificates and power of attorney to the president of the bank, the latter had given any intimation of a purpose not to make the transfer promptly, or had avowed an intention to postpone action until a sufficient amount of stock was obtained to fill Coburn's order, it may be that the failure of the defendants to take legal steps to compel a transfer would, in favor of the creditors of the bank, have been deemed a waiver of the right to an immediate transfer on the stock register. But no such intimation was given; no such avowal was made. No objection was made to the power of attorney, or to the discharge of the defendants from liability. So far as the record shows nothing was said or done by the bank's officers to raise a doubt in the minds of the defendants' agents that the transfer would be made at once.

It was suggested in argument that the defendants should have seen that the transfer was made. But we were not told precisely what ought to have been done to this end that was not done by them and their agents. Had anything occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been wanting in due diligence had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. Their conduct was, under all circumstances, that of careful, prudent business men, and it would be a harsh interpretation of their acts to hold (in the language in some of the cases, when considering the general question under a different state of facts), that they allowed or permitted the name of Whitney to remain on the stock register as a shareholder. We are of opinion that, within a reasonable construction of the statute, and for all the objects intended to be accomplished by the provision imposing liability upon shareholders for the debts of national banks, the responsibility of the defendants must be held to have ceased upon the surrender of the certificates to the bank and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser.

For the reasons stated, the judgment is reversed, and the cause remanded, with directions to enter a judgment for the defendants.

NOTE.—*Transfer of Bank Stock—Substitution of Liability.*—The case of Johnson v. Laflin[1] resembles the principal case in its main features. It appeared that L, owning shares of stock in a national bank, of which B was president, employed a broker to sell them. The broker, without L's knowledge, sold them at the market value to B, individually, and received in payment his individual check on the bank, and delivered to him the share certificates, assigned in blank, with blank powers of attorney thereon indorsed, authorizing the transfer of the shares on the books of the bank. The bank was then insolvent, but this fact was not known to L or the broker. It was held that L was not liable to pay back to the receiver of the bank, which had subsequently suspended, the money received in payment for his shares, nor to be declared still a stockholder.

In regard to ordinary cases of transfer, "as between the transferrer and transferee of a stock certificate, it is very well settled that, in the absence of statutory restrictions, the beneficial interest passes by assignment and delivery of the certificate, as in the case of any other species of personal property or chose in action, no particular formality being necessary to invest the transferee with the right and title of the transferrer, as between the parties to the transfer. As between the corporation and the transferee of a certificate of its stock, the right acquired by the latter depends upon the charter and general laws which control the matter, a corporation being the creature of statute law and regulated for the most part by it."[2]

[1] 5 Dill. 65; affirmed 103 U. S. 804.

[2] Daniel on Neg. Inst. § 1706b, citing Biddle on Stock-

But after a proper assignment and delivery of the certificate, if the bank refuses to make the transfer, it can be compelled to do so at the instance of either party.[3] But since the law in regard to *national* banks requires the transfer to be made "on the books," an executor's indorsing a transfer on the certificate, and delivering it to the purchaser, does not pass the title.[4] And a bank has no right to make a transfer of stock upon its books unless empowered by the original holder of its certificates or by the assignee thereof.[5] The transfer may be made before the stock is paid for. That is, where a subscriber to bank stock transfers his shares in good faith to another person, with the assent of the bank, the bank taking the note of the transferee for the shares in lieu of that of the subscriber, such substitution exonerates the original stockholder from all liability to pay for such shares.[6] The transfer may be made after the insolvency of the bank, and will then impose upon the transferee the liability of a stockholder.[7]

One who allows himself to appear on the books of a national bank as an owner of its stock, is presumptively liable to creditors as a shareholder.[8] And when he is sued as such, the burden of disproving that presumption is cast upon him.[9] But where shares are transferred to one without his knowledge or consent, and without consideration, such transferee can only be made liable, as owner of the shares, on the ground of fraud, as where he acquiesces in the transfer, for the benefit of a third person and to injure the creditors of the bank.[10] One whose name is on the books, as shareholder in a national bank, is liable for the debts of the bank to the amount of the shares, notwithstanding he holds the transfer or assignment only as collateral security for a loan,[11] or under a secret declaration of trust.[12] The provision of the statute that shareholders by transfer in banking associations shall be subject to the liabilities of prior shareholders, does not require a transferee to repay dividends unlawfully declared and paid to his predecessor in interest while the corporation was insolvent.[13]

The liability of stockholders in a national bank for the debts of the bank, under Rev. Stats. § 5151, is a contract obligation and not a penalty, and hence survives against their personal representatives,[14] and is transferred to legatees upon stock distributed to them.[15] It is not uncommon to provide by charter or by-law, or by general stature, that no stock in the bank shall be transferred by any shareholder who may be indebted to the bank, until all such indebtedness shall be fully discharged. Such a provision, though intended mainly for the security of the bank, operates also incidentally in favor of the indorsers of such debtors.[16] Whether it will embrace only debts actually matured at the time of the transfer, or may be extended to future accruing obligations, will depend upon the wording of the clause.[17] It seems that such a provision does not apply to a purchase of bank stock at sheriff's sale.[18] And as a by-law of a national bank, such a provision would be clearly void; because they cannot make loans on the security of their own stock.[19]

H. CAMPBELL BLACK.

holders, 268; Dos Passos on Stockholders, 591, 623, 628; Angell & Ames on Corp. §§ 354, 564; Morawetz on Corp. § 326.

3 Johnson v. Dallin, 103 U. S. 804; Bank v. Lamier, 11 Wall. 369; Webster v. Upton, 91 U. S. 65; Bank v. Smalley, 2 Cow. 770; Gilbert v. Iron Co., 11 Wend. 627; Commercial Bank v. Kortright, 22 Wend. 348; Sargeant v. Ins. Co., 8 Pick. 90.

4 Weyer v. Bank, 57 Ind. 198.

5 Dunn v. Bank, 11 Barb. 580.

6 Cowles v. Cromwell, 25 Barb. 413.

7 Robinson v. Beall, 26 Ga. 17.

8 Anderson v. Phila. Warehouse Co., 111 U. S. 483; *In re* Reciprocity Bank, 22 N. Y. 9.

9 Turnbull v. Payson, 95 U. S. 418; Thornton v. Lane, 11 Ga. 459.

10 Robinson v. Lane, 19 Ga. 337.

11 Hale v. Walker, 31 Iowa, 344; Moore v. Jones, 3 Woods, 53; *In re* Empire City Bank, 18 N. Y. 199.

12 Young v. Tough, 23 N. J. Eq. 325.

13 Hurlbut v. Taylor, 62 Wis. 607. See Thebus v. Smiley, 110 Ill. 316.

14 Irons v. Bank, 8 Reporter, 481.

15 Withers v. Sowles, 20 *Id.* 709.

16 Klopp v. Bank, 46 Pa. St. 88.

17 Compare Leggett v. Bank, 24 N. Y. 283, with Reese v. Bank, 14 Md. 271.

19 Bryon v. Carter, 22 La. Ann. 98.

19 Feckheimer v. Exchange Bank, 79 Va. 80; U. S. Rev. Stats. § 5201.

EQUITY — JOINT CREDITORS — SEPARATE CREDITORS—PARTNERSHIP — LIEN.

SCULL'S APPEAL.

Supreme Court of Pennsylvania, January 24, 1887.

1 *Partnership—Notice that does not Constitute.*—An advertisement by A that he having bought out his partners had admitted B and C "to an interest," and will continue the business, etc., under the name and style of A & Co., is not sufficient evidence of the existence of a partnership as to third persons, it appearing that B and C were merely salaried employees of A.

2. *Joint Estate—Joint Creditors—Lien.*—A separate creditor of A, who has by judgment and execution obtained a lien on the goods of A, or A & Co., is entitled to priority of satisfaction over subsequent creditors of the alleged firm of A & Co., although if such firm existed the goods would have been its property. Unless there is really a joint estate there can be no priority of alleged joint creditors.

Appeal by David Scull and others from a decree in the court below dismissing their exceptions to the report of the auditor appointed to distribute the fund arising from a sheriff's sale of the property of Howard D. Thomas & Co.

STERRETT, J. delivered the opinion of the court:

Appellents' contention is that they and others, attaching creditors of Howard D. Thomas & Co., have a lien on the fund for distribution, superior in right to that of the appellees, who are execution creditors of Howard D. Thomas alone. The fund in court, $23,437.07, represents personal property which was first taken in execution, as the separate property of Howard D. Thomas, on writs of *fieri facias* in favor of appellees; then attached by appellants and others, under the act of 1869, as the partnership property of Thomas, Skeffington, and Reinstein, partners, etc., in the name of Howard D. Thomas & Co.; and subse-

quently sold by the sheriff under said executions, and also under orders of the court in the attachment cases. The fund thus produced was claimed by appellants by virtue of their lien as attaching creditors of the alleged co-partnership, and also by appellees, under their respective executions, as proceeds of the individual property of their debtor Howard D. Thomas.

If there was any attachable interest in the property thus sold, appellants had an undoubted right to be heard on the question of distribution. The fact that their claim was not in judgment could not deprive them of their right to present it, and insist upon participating in the distribution by virtue of the lien of their attachment. Whether they were entitled to the fund, or any part of it, was a question which they had a right to raise and have adjucated. Their position is analogous to a mechanic having a lien on property sold by the sheriff. He has a right to assert his claims on the fund realized by the sale, without having first reduced it to judgment, or even without having filed a lien therefor, provided the time for doing so had not expired before the sale. When, as in this case, no issue is demanded by either party, the auditor intrusted with the distribution has jurisdiction to determine the validity as well as the amount of the claim.

The learned auditor's findings of fact are very clearly and fully set forth in his report. One of the conclusions drawn by him is that in fact no partnership relation ever existed between Thomas, Skeffinton and Reinstein, in respect of the property in question, or anything else; that the business was conducted, by Howard D. Thomas alone, in the name of Howard Thomas & Co.; that Skeffington and Reinstein were merely salaried employes of Thomas, having no interest whatever in the goods or property connected with the business; and that the property out of which the fund was realized was owned by Thomas individually. This conclusion is so manifestly correct that it has not been seriously controverted by appellants. Any attempt, therefore, to further fortify it by reference to the facts or otherwise would be a work of supererogation.

Assuming the correctness of the foregoing conclusions, in connection with the admitted fact that the liens of appellees' executions were prior in time to the attachments, we have a state of facts which bring the case within the rulings of this court in Doner v. Stauffer, 1 Pen. & W. 198; Baker's Appeal, 21 Pa. 76; York Co. Bank's Appeal, 32 Pa. 446; and other cases affirming the same principles.

In the case last cited, Keys and Moore executed articles of copartnership, in which they agreed, among other things, that Keys should be the exclusive owner of the capital stock until Moore should contribute thereto certain sums of money, which he failed to do. An execution, issued against Keys by a separate creditor, was levied on the stock. Afterwards another execution against the firm was levied on same goods, and they were sold on both writs. In a contest between these execution creditors, it was held that the former was entitled to the proceeds, on the ground that the equities of the firm creditor could be worked out only through the equities of the partners themselves; and, Moore having no equity against Keys, the joint creditor could have none against the prior individual creditor of Keys. Thompson, J., delivering the opinion of the court in that case, said: "Between partners themselves the assets of the firm constitute a fund for the payment of their joint liabilities, and each member has an equity which he can enforce to accomplish this result, and consequently a lien to that extent (*Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Ves. 3; Story Partn. § 360), provided he has an interest in the assets. * * * When a joint creditor levies on property of the firm, his execution fixes and attaches to this right to the same extent that it existed in the partners, and hence the preference over a separate execution creditor in the distribution. But this is predicated solely on the fact that there is joint property. Where there is no joint property, there is, of course, nothing on which the rule can operate. The mere nominal ownership is not enough. There must be an equity. If that equity never existed, a creditor's execution could not attach to any right, amounting to a lien, to have the assets appropriated to a partnership debt. That Moore had no interest in the firm property is found by the auditor. That this was a necessary conclusion from the article of copartnership, and a failure to comply with it, cannot be doubted. * * * The property was all individual property, and priority of seizure gave priority of right in the distribution. To the complaint that the property was in appearance firm property, and that it is a fraud on a creditor of the firm not to hold so in fact, notwithstanding it is in reality not so, it may be answered that a creditor can seize no more than belongs to the debtor, and succeeds only to his rights as defined by the law, and that he can blame no one but himself for becoming a creditor. But, if the rule were not so held, the separate creditor might with more reason complain. He might point to the fact that the property was separate, not joint, and claim that, as he was first in lien and seizure, he ought not to be last in distribution, because the property was but partnership in appearance, while separate in fact. He might with propriety complain if a fiction should prevail over the reality."

In view of the conclusive finding of the learned auditor that the property from which the fund in court was realized was the separate property of Howard D. Thomas, and not the property of the alleged firm, the reasoning of the learned judge, in the case quoted from, applies with great force in this case. Some of the cases relied on by appellants take a different view of the subject, but we regard the doctrine of our own cases as more consonant with reason and the weight of authority.

It follows from what has been said that the con-

trolling fact in the case is that the property represented by the fund for distribution was the separate property of Thomas, and not the joint property of the alleged firm composed of Thomas, Skeffington, and Reinstein. But assuming, for the sake of argument, that it is not so, and that the case turns on the question whether Skeffington and Reinstein are not estopped by the advertisement, their own acts, etc., from denying that they were Thomas' partners, we think the conclusions of the learned auditor as to that question are correct. The advertisement, signed by Thomas alone, wherein he announces that "having bought the interest of David S. Burns, Jr., in the above business, I will continue it under the firm of Howard D. Thomas & Co., admitting Nathan Skeffington and Frederick K. Reinstein to interests from this date," did not warrant the inference that they were admitted as partners. It is entirely consistent with what the auditor found the facts to be; viz., that their "interests" were not those of partners, but merely contingent interests in profits, dependent on the realization of net profits in excess of $25,000. The fixed salary of the former was $2,500, and that of the latter $2,000, payable in monthly installments, coupled with the additional contingency of seven and one-half per cent. on the excess of net profits over $25,000. The announcement was that Thomas himself would continue the business in the name of Howard D. Thomas & Co. At most, this was calculated to prompt a prudent man to make inquiry. If so, it was the duty of appellants to inquire what was meant by admitting Skeffington and Reinstein "to interests." If they had performed that duty, they would have ascertained that the parties named were merely employees, and not partners.

There is nothing in the acts shown to have been done by Skeffington and Reinstein in the course of their employment that would estop them from denying the alleged copartnership relation. While Thomas' declarations, made in their absence, and without their knowledge, might estop him, they were not bound thereby. The existence of a partnership may be proved by the separate declarations of each of the alleged partners; but neither of them is bound by the separate admissions of the others of which he has no knowledge. But it is unnecessary to pursue the inquiry further. The learned auditor has clearly shown that the evidence is insufficient to estop either of the two parties named from denying that they were partners of Thomas.

Decree affirmed, and appeal dismissed, at the costs of appellants.

WEEKLY DIGEST OF RECENT CASES.

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1. ACCORD AND SATISFACTION—*Conditional Deposit with Bank.*—Defendants made a deposit in a bank to be placed to the credit of plaintiff, saying in their letter: "Don't place this to credit until he sends receipt in full." The bank did place the amount to the plaintiff's credit. The cashier told plaintiff, when he asked for a statement of his account, that defendant required a receipt in full. This he declined to do, insisting that there was more due him. He then drew out his balance. *Held*, not a satisfaction of the debt.—*Simms v. Hampson*, S. C. Ariz., Jan. 17, 1887; 12 Pac. Rep. 686.

2. ACTION — *Form of — Case or Contract.*—The complaint alleged that defendants, in pursuance of a design to extend their business, agreed with plaintiff that he should open a store in a certain place, and that they would supply him with goods, to carry on the business; that, in reliance thereon, plaintiff abandoned his other business, and leased a store in the place named, and made other preparations to go into the business proposed, but defendants neglected and refused to perform their part of the contract. Upon the facts stated, *held*, that an action on the case would not lie.—*Mulvey v. Staab*, S. C. N. Mex., Jan. 24, 1887; 12 Pac. Rep. 699.

3. AGISTMENT — *Injuries to Cattle — Burden of Proof—Due Care—Instructions to Jury.*—One who takes cattle to pasture is bound to use reasonable and ordinary care to protect them from injury; and, if a plaintiff claims that his cattle were injured by the negligence of the agister, the burden of proof is upon him to show such negligence, and the refusal of the judge at the trial to give an instruction which is a contradiction of this rule is no ground for exception.—*Wood v. Remick*, S. J. C. Mass., Jan. 25, 1887; 9 N. E. Rep. 831.

4. ALTERATION OF INSTRUMENTS — *Promissory Notes—Purchase of Land—Specific Performance—Election.*—Adding the name of another maker to a note, without the consent of those already bound, is such a material alteration as to vitiate the instrument. But, where the note is for the

purchase price of land of which the purchaser is in possession, the purchaser cannot, in equity, escape all liability for the purchase money because of the alterations, and yet retain the land. He is put to his election to rescind the contract of purchase upon equitable terms, or submit to enforcement of the lien.—*Singleton v. McQueny*, Ky. Ct. App., Jan. 15, 1887; 2 South. Rep. 652.

5. —— *Subscription to Book—Insertion of Word "Cloth" and Figures "625."*—A written contract of subscription for certain books, is materially altered by the insertion of the word "cloth" and the figures "625," after the contract has been signed, and a contract thus altered is not binding upon the signer.—*Osgood v. Stevenson*, S. J. C. Mass., Jan. 10, 1887; 9 N. E. Rep. 825.

6. APPEAL—*Justices' Courts—Notice of Appeal—Affidavit.*— In Oregon, notice of appeal means simply, by writing, making known to the appellee the fact that an appeal has been taken. Whatever writing does this is sufficient. The affidavit of a surety for appeal is insufficient if the sum which the affiant is stated to be worth, is left blank.—*Starks v. Stafford*, S. C. Oreg., Dec. 20, 1887; 12 Pac. Rep. 870.

7. ARMY AND NAVY — *Pay of Navy Officer.*—The secretary of the navy cannot declare a service to be a shore duty if, in fact, it was performed by the officer as sea service. Service on a training ship at anchor in an arm of the sea, is sea service within Rev. Stats. U. S., § 1571.—*United States v. Symonds*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 411.

8. ASSESSMENT FOR DRAINS—*Suit to Collect and Enforce Liens—Complaint — Notice.*— The complaint, in a suit to collect benefits assessed for the construction of a ditch and enforce the statutory lien therefor, must allege or show, by proper exhibit, that notice was given by the petitioner of his intention to file his petition for the construction of the ditch.—*Kennedy v. State*, S. C. Ind., Jan. 12, 1887; 9 N. E. Rep. 778.

9. ASSIGNMENT—*Creditor's Collaterals.*— A creditor whose debt is partly secured by collaterals, is entitled to a dividend under a general assignment only upon the balance of his demand, after deducting the amount realized upon the collaterals.—*Third Nat. Bank v. Lanahan*, Md. Ct. App., Jan. 5, 1887; 7 Atl. Rep. 615.

10. BANKS AND BANKING— *Certificate of Deposit—Signed by Cashier — Bank Liable.*— A bank ordered certain goods from plaintiff's on behalf of third parties. These parties being unable to pay at the time, the then acting cashier of the bank took their paper, and sent to plaintiffs a certificate of deposit payable in three months, and regular in form, except that it was signed by him in his name alone, and not as cashier. *Held*, that the proceeding was in the ordinary course of business, and the cashier did not exceed his authority, and bank was liable.—*Crystal Plate Glass Co. v. First Nat. Bk.*, S. C. Mont., Jan. 12, 1887; 12 Pac. Rep. 678.

11. CONSTITUTIONAL LAW — *Evidence — Jurisdiction.*—The constitutional requirement that full faith and credit must be given to the public acts, records, etc., of another State, means that they shall have the same credit elsewhere as at home. The laws of a State must be proved as facts in another State, but federal courts take notice of the laws of all the States, when exercising original jurisdiction, but upon appeal, whatever was matter of fact in the court below is matter of fact in the supreme court also. And when it appears that both the parties to a suit and the court understood that the decision therein was to be made, not upon anything peculiar to one State of the United States, but upon the general law of the land applicable to the facts established by the evidence, the Supreme Court of the United States has no power to bring the decision under review. And to give jurisdiction to the Supreme Court of the United States on appeal, and it is alleged that a contract in question was *ultra vires*, it must be made to appear on the record that the facts made it necessary for the court to give effect to the contract in view of some peculiar jurisprudence of the State and not of the general law of the land.—*Chicago, etc. R. Co. v. Wiggins Ferry Co.*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 398.

12. —— *Impairing Obligation of Contract—Tax Receivable — State Coupons.*— Virginia act of March 4, 1886, providing that, when coupons are offered in payment of license fees, purporting to be the tax-receivable coupons of the State bonds issued under the act of March 30, 1871, or that of March 28, 1879, they shall not be accepted for such purpose until a decision of the courts as to their genuineness has been obtained, in accordance with a plan for obtaining such decision provided by the act of January 14, 1882, but that the applicant may entitle himself to receive a license immediately by depositing the amount of the fee in cash, the same to be refunded if the coupons are decided to be genuine, is not unconstitutional, as impairing the obligation of the contract under which the bonds were issued, making them receivable for such demands.—*Commonwealth v. Jones*, S. C. App. Va., Jan. 20, 1887; 1 S. E. Rep. 84.

13. —— *Obligation of Contracts — Franchise—Water Company.*—A State may grant to a corporation the exclusive right to supply a city with water, and such grant is held (in the case in judgment) to be a contract, the obligation of which the State cannot impair, either by a new constitution or otherwise. Although the corporation is subject to the police power of the State, the action of a competing company cannot be justified on that ground, neither the State nor the city having proceeded in the matter.—*St. Tammany, etc. Co. v. New Orleans, etc. Co.*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 405.

14. —— *Gen. Laws Mont. Fifth Div., § 711; Act of March 7, 1883.*—Gen. Laws Mont. Fifth Div. § 711, providing for the examination and custody of persons found insane, though imperfect, is not constitutional. That portion of it which required that the person committed shall be shown to be incompetent to provide for his own proper care or support, etc., is abrogated by the act of March 7, 1883, providing "that all persons hereafter adjudged insane shall be cared for by the territory."—*Territory ex rel. v. Sheriff*, S. C. Mont., Jan. 10, 1887; 12 Pac. Rep. 662.

15. —— *Virginia State Coupon Bonds to be Produced — Expert Testimony Inadmissible to Produce.*—The Virginia act of January 26, 1886 (ch.

49), entitled "An act to prescribe a rule of evidence in certain cases," is constitutional, valid, and binding on the courts. Under it, on a trial of the validity of detached coupons of State bonds, the State may require the bonds from which the coupons are alleged to have been detached to be produced in evidence. The act of Virginia assembly of January 21, 1886, forbidding the use of expert testimony in the trial of an issue as to the genuineness of coupons detached from bonds of the State of Virginia, is valid, and binding on the courts as a rule of evidence.— *Commonwealth v. Weller*, S. C. App. Va., Jan. 13, 1887; 1 S. E. Rep. 102.

16. CONTRACT — *Executory — Consideration — Deceased Brother's Widow.*—Love and affection for a deceased brother's widow is not sufficient consideration to support a bond and a mortgage securing it, though a partial payment of interest on the bond has been made by some of the obligors, nor the mutual promise by all of the obligors nor, the acceptance of the trust by the trustee. But the additional recital of "for value received" imports a valuable and legal consideration.—*Cotton v, Graham*, Ky. Ct. App., Jan. 6, 1887; 2 S. W. Rep. 647.

17. —— *"Sub-Lessee" of Railroad Contract — Construction.*—Defendants sublet to plaintiff, by a written agreement, the construction of three tunnels, comprised in their contract with U, to construct a railroad. Defendants were to pay plaintiff for the work done in any calender month, before the twentieth day of the next month. The defendant's contract with U was made part of the agreement, except so far as they conflicted. By the contract with U, defendants were to be paid monthly, on the certificate of U's engineers. *Held*, that the payments to plaintiff were not conditional on the presentation of the certificate of U's engineers, plaintiff having no control over or dealings with U or his engineers, and the interval of twenty days being apparently fixed up to enable defendants to get their certificates, and pay thereon, before payment to plaintiff.—*Simms. v. Hampson*, S. C. Ariz., Jan. 17, 1887; 12 Pac. Rep. 686.

18. CORPORATIONS—*Purchase of Stock in Mining Company—Evidence.*—In an action of contract to recover the price of certain shares of stock in the M Co., sold to the defendant, the fact that the defendant signed a memorandum setting forth that he had bought a certain number of shares in the M Co. is an admission by him that there was an M Co. that issued what were called by the parties shares of stock which the defendant bought. And, in the absence of evidence that the certificates offered by the plaintiff were not genuine, or were not what were generally known and called shares of stock in the M Co., or were not what was intended by the parties, the defendant is liable for the purchase money.—*Mann v. Williams*, S. C. Mass., Jan. 10, 1887; 9 N. E. Rep. 807.

19. —— *Sales of Groceries by Its Agent—Ultra Vires.*—A corporation may recover the value of groceries sold to the defendant through an agent of the corporation, the principal being undisclosed, although the corporation was chartered for the purpose of manufacturing woolen goods, and the sale was *ultra vires.—Slater Woolen Co. v. Lamb*, S. C. Mass., Jan. 10, 1887; 9 N. E. Rep. 823.

20. CRIMINAL LAW—*Appeal—Transcript—Late Filing.*—An appeal to the supreme court, in a prosecution for a misdemeanor, will not be entertained when the transcript is not filed within the sixty days allowed by statute, although the failure to do so is caused by excusable accident, and the attorney-general waives the objection.—*Smith v. State* S. C. Ark., Jan. 8, 1887; 2 S. W. Rep. 661.

21. —— —— *Venue—Record—Exhibiting Gaming Table.*—Venue of the offense, as laid in the inment, must be shown in the record. Evidence required to prove that defendant kept the table for gaming purposes.—*Wells v. State*, Ct. App. Tex., Oct. 13, 1886; 2 S. W. Rep. 609.

22. —— *Assault and Battery — Aggravated Assault—Terms Defined.*—The terms "coupled with an ability to commit," used in the definition of an assault, means the "use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances *calculated* to effect that object."—*Coker v. State*, App. Ct. Tex., Oct. 13, 1886; 2 S. W. Rep. 615.

23. —— —— *Assault to Murder—Charge of the Court.*—An assault with intent to murder is an assault coupled with the intent to murder, and the charge of the court should define what an assault is.—*Driskill v. State*, Ct. App. Tex., Oct. 23, 1866; 2 S. W. Rep. 622.

24. —— —— *Indictment—Continuance.*—Indictment for assault with intent to murder is sufficient without stating the means used or the manner in which they were used.—*Price v. State*, Ct. App. Tex., Oct. 27, 1886; 2 S. W. Rep. 622.

25. —— *Bail and Recognizance — Sureties —Defendant Taken in Custody by Operation of Law.* —Crim. Code Ky. § 229, providing that, during the trial of an indictment for felony, defendant shall be committed to and remain in the custody of the proper officer, *held*, after trial has commenced, defendant is in custody, and bail no longer liable for his appearance; but the trial is not to be considered as commenced until issue formed and jury sworn.—*Willis v. Commonwealth*, Ct. App. Ky., Jan. 20 1887; 2 S. W. Rep. 654.

26. —— *Evidence — Co-conspirator — Witness—Homicide—Verdict.*—Declarations of a co-conspirator in the absence of the defendant are admissible only when made pending the criminal enterprise. Leading questions may be propounded to a weak-minded witness, upon examination-in-chief. In a verdict of guilty of homicide the degree of the crime must be specified.—*Armstead v. State*, Ct. App. Tex., Oct. 23, 1886; 2 S. W. Rep. 627.

27. —— *Gaming—At a Saloon—Statute—Repeal —Courts.*—Gaming in a room adjoining a saloon with which there is communication for drinks by a sliding window is gaming in a saloon, within the meaning of the Texas statute. A statute, covering the entire ground of a previous statute, which establishes an entirely different system repeals such previous statute. *Stebbins v. State*, Ct. App. Tex., Oct. 16, 1886; 2 S. W. Rep. 617.

28. —— *Indictment—Duplicity— Theft — Embezzlement.*—In this State embezzlement is punishable as theft. The minimum and maximum punishment for theft of property worth over $20 is two and ten years; for horse theft, five and fifteen

years. A count in an indictment, charging the embezzlement of a horse and of a gun and pistol of the combined value of $20, is bad for duplicity. —*Hineman v. State*, Tex. Ct. App., Oct. 23, 1886; 2 S. W. Rep. 619, 640.

29. —— —— *Mayhem—Instruction—Conviction of Assault.* — Indictment, charging the accused with wilfully and maliciously shooting off the toe of another, charges mayhem sufficiently. In prosecution for assault with intent to maim the intent must be shown, and the court should charge thereon. Under indictment for mayhem, defendant cannot be convicted of assault with intent to murder.—*Davis v. State*, Tex. Ct. App., Oct. 23, 1886; 2 S. W. Rep. 630.

30. —— *Jury, Trial by — Felonies and Misdemeanors — Constitutional Law.*— The constitutional rule, which prohibits a trial without jury in felony cases, even upon a plea of guilty, does not extend to misdemeanors.—*Moore v. State*, Tex. Ct. App., Oct. 27, 1886; 2 S. W. Rep. 634.

31. —— *Indictment—Recitals.*—Where indictment showed that its recitals were the declarations of the regularly impaneled grand jury, but omitted "on their oaths present," it was fatally defective.—*Vanvickle v. State*, Tex. Ct. App., Dec. 17, 1886; 2 S. W. Rep. 642.

32. —— *Larceny — Evidence — Ownership.* — In prosecution for larceny by stealing cattle, a bill of sale of the property, though unrecorded, is admissible evidence of ownership. The non-production of the bill of sale unaccounted for reduce the evidence of its existence to the grade of secondary evidence. Ownership of cattle may be proved by evidence showing legal care and control of such property when put in issue in criminal proceedings.—*Morrow v. State*, Tex. Ct. App. Nov. 13, 1886; 2 S. W. Rep. 624.

33. —— —— *Venue.*—Theft, and theft from the person are distinct and separate offenses. The latter can occur only at one place. The former is considered to be committed in any county into which the thief takes the property.—*Gage v. State*, Tex. Ct. App., Oct. 27, 1886; 2 S. W. Rep. 638.

34. —— *Murder — Manslaughter — Indictment — Evidence—Witness.*—In Texas, an indictment can only be set aside because it is not preferred by at least nine of the grand jurors, or because a stranger was present when the charge was under consideration. To authorize evidence of declarations of deceased, it is sufficient to prove that defendant was present when they were made. A witness cannot be impeached by cross-examination as to the facts which, if admitted, would be collateral or irrelevant, so as to introduce other testimony on that point to contradict him, and discredit his testimony. Declarations by deceased as to his motive in going to a particular place, made in the absence of defendant, are not admissible to prove that deceased had no intention of fulfilling threats of violence. Adequate cause to reduce murder to manslaughter is a question for the jury, upon all the facts disclosed by the evidence; it is to be measured by sudden passion.—*Johnson v. State*, Tex. Ct. App., Nov. 10, 1886; 2 S. W. Rep. 609.

35. —— *Practice—Trial — Clearing Court-room.* In proper case, where indecent details may be expected in evidence, the court may order the room to be cleared of all but a small and reasonable number of persons.—*Grimmett v. State*, Tex. Ct. App., Oct. 23, 1886; 2 S. W. Rep. 631.

36. —— *Trial — Separation of Jury.*—After the jury has been sworn in a felony case, the law expressly inhibits their separation "until they have returned a verdict, unless by permission of the court, with the consent of the attorneys representing the State and the defendant, in charge of officer;" and no person shall be permitted to converse with a juror after he has been impaneled in a felony case, except in the presence and by the permission of the court. A violation of this rule constitutes reversible error, without reference to the question of probable injury, as in the case of a separation without consent of parties or permission of the court. The trial court cannot, over objection of the defendant in a felony case, permit an impaneled juror to converse with the State's attorney, or any one else, except in the presence of the court.—*DeFriend v. State*, Tex. Ct. App., Dec. 11, 1886; 2 S. W. Rep. 641.

37. DEED—*By Settler—Power of Attorney — Evidence—Ancient Deed—Limitations—Adverse Possession.*—The deed of a settler in Texas, made before his title is complete, and before the date of the constitution of the republic, is void. A power of attorney, irrevocable, authorizing the attorney to perfect the title and convey the land, is equivalent to a deed, but will be void if the deed would have been so. The record of an ancient deed is not admissible in evidence if controverted by affidavits, unless it appears to be over thirty years old. Possession of land by one claiming only for improvements is not adverse possession.—*Brown v. Simpson*, S. C. Tex., Jan. 14, 1887; 2 S. W. Rep. 644.]

38. EJECTMENT—*Executor Cannot Maintain.*—An executor cannot maintain ejectment to recover his testator's realty, the will not appearing in the record, and there being no averment that it vested him with title to the realty.—*Sturgeon v. Underwood*, Ky. Ct. App., Jan. 20, 1887, 2 S. W. Rep. 655.

39. —— *Improvements — Value of Land Without — No Finding on.*—Upon trial of ejectment without a jury, defendant obtained judgment for improvements, no finding of value of land without improvements was made or asked for by plaintiff. *Held*, that for want of such finding judgment will not be reversed.—*Coleman v. Bell*, S. C. N. Mex., Jan. 8, 1887; 12 Pac. Rep. 657.

40. ESTOPPEL—*Lien—Equitable Lien—Replevin — Custom Duties—Tender.*—If one who claims certain goods, and intends to replevy them, stands by and knowingly allows another who honestly believes himself to be the owner to pay the customs duties upon them, he cannot maintain his action of replevin without first tendering the amount so paid.—*Fowler v. Parsons*, S. J. C. Mass., Jan. 10, 1887; 9 N. E. Rep. 799.

41. —— *Representations as to Title—Attachment and Sale.*—Where the owner of certain property inadvertently makes representations which induce another to believe that the property belongs to a third party, and he attaches the property as belonging to this third party, the owner, in an action for conversion by the attachment, is not estopped to set up his title.—*Moore v. Spiegel*, S. J. C. Mass., Jan. 10, 1887; 9 N. E. Rep. 827.

42. EVIDENCE—*Wills—Proceedings to Establish a Lost Will.*—In a proceeding to establish a lost will, parol and secondary evidence of the existence and contents of the will is admissible; but where the only evidence adduced for this purpose is the deposition of a witness, eighty-five years of age, who testified that sixty-eight years before she had seen the will, and heard it read, and who undertook to testify, not only to its provisions, but to the degree of estate devised, *held*, that such testimony, though not incompetent, was insufficient, and that the title of one who had been in possession of the property in dispute for seventeen years would not be disturbed.—*Apperson v. Dowdy*, S. C. App. Va., Jan. 13, 1887; 1 S. E. Rep. 105.

43. ——— *Witness—Impeaching—Auditor a Witness as to Statements before Him.*—At the trial of a case in the superior court, it is competent for the auditor who heard the case to testify that a witness who has testified at the trial, made statements, at the hearing before him, contradictory of those made at the trial, where the auditor has not set out the testimony of the witness in his report, and where the effect of the auditor's testimony is not to add to or control his report.—*Tobin v. Jones*, S. J. C. Mass., Jan. 17, 1887; 9 N. E. Rep. 804.

44. ——— ——— *Attorney Acting for Both Parties.*—Where an attorney acts for both parties, he is a competent witness, and communications made to him are not within the rule prohibiting an attorney from divulging confidential communications.—*Hanlon v. Doherty*, S. C. Ind., Jan. 7, 1887; 9 N. E. Rep. 782.

45. EXECUTOR—*Interest—Mingling of Funds.*—An executor, otherwise without fault, who mingles the trust funds with his own money and uses it in his business, but without making as much as legal interest, is charge with simple interest at the highest rate.—*Perkins v. Hollister*, S. C. Vt., Jan. 25, 1887; 7 Atl. Rep. 605.

46. FIXTURES—*Electric Light Wires—Mortgage of Land on Which Machinery is Situated.*—An electric light company, engaged in lighting a city, owned a lot upon which the plant was placed, including boilers, engines and dynamo. The company erected in the streets eighteen masts, and wires were strung thereon, along which the electric current was conducted to the electric lamps. *Held*, that the wires formed an integral part of the machinery situated upon the lot, and passed as fixtures to the mortgagor under a mortgage of the lot, "together with all machinery, including the boiler, engine and dynamo now situated on said land, and together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining."—*Fechet v. Drake*, S. C. Ariz., Jan. 18, 1887; 12 Pac. Rep. 694.

47. GAMING—*Frequenting Gambling House—Section 2085 Rev. Stat. Ind., 1881 — Evidence.*—Evidence of a single, or even an occasional visit to a gambling house, is not sufficient to sustain a conviction, under § 2085, Rev. Stat. Ind. 1881, for frequenting a gambling house. Something akin to a habit must be shown.—*Green v. State*, S. C. Ind., Jan. 12, 1887; 9 N. E. Rep. 781.

48. GUARDIAN AND WARD—*Accounting—Guardian Occupying Property—Liability for Rent.*—Where a guardian, duly qualified, has agreed with a co-guardian of a brother of his ward's upon a rent to be paid for a store, the joint property of himself and the ward, and occupied by such guardian, and has regularly accounted for such to the other guardian, and, on his own ward's marriage, has settled in full with her husband on that basis, and, after the lunacy of such husband, has settled in full with the wife, and has continued to pay the rent agreed upon to the parties entitled, without complaint, during several years, he cannot afterwards, in an action brought by his ward, be compelled to account for a higher rate than that agreed upon and paid by him.—*Paxton v. Gamewell*, S. C. App. Va., Jan. 20, 1887; 1 S. E. Rep. 92.

49. HOMESTEAD — *Abandonment — Removal from State—Return.*—Where a debtor sells his homestead, and removes to another State, with the intention of remaining there, but, subsequently returning, buys another homestead in Kentucky, the latter is not exempt from debts contracted prior to his removal.—*Coldwell v. Sevier*, Ky. Ct. App., Jan. 15, 1887; 2 S. W. Rep, 651.

50. ——— *Exchange of—Conveyance to Wife.*—If a judgment debtor conveys his homestead in exchange for other real estate, which is conveyed to his wife, the latter property does not become subject to the judgment.—*Airey v. Buchanan*, S. C. Miss., Jan. 10, 1887; 1 South. Rep. 101.

51. INJUNCTION—*Setting Aside Order—After Term—Upon Appeal to Supreme Court of United States — Territorial Courts.*—An injunction in favor of an appellant pending appeal may be set aside, after the term at which it was granted, if the court had not jurisdiction to grant it. A territorial court can grant an injunction in favor of plaintiff, pending an appeal taken by him from such court to the Supreme Court of the United States.—*Bullion, etc. Co. v. Eureka, etc. Co.*, S. C. Utah, Jan. 18, 1887; 12 Pac. Rep. 660.

52. INTEREST — *Written Instrument—Comp. Laws Ariz. § 3540*—A written agreement for the assignment of a contract for the construction of railroad tunnels is a written instrument, within Comp. Laws Ariz. § 3430, providing that "interest shall be allowed * * * on all moneys after they become due on any bond, bill, promissory note, other instrument in writing," and the assignee is entitled to interest on the payments thereunder as they fall due.—*Simms v. Hampson*, S. C. Ariz., Jan. 17, 1887; 12 Pac. Rep. 686.

53. INTERNATIONAL LAW—*Treaties — Jurisdiction—Consular Power.*—Notwithstanding the existing treaty with Belgium, the local authorities of New Jersey have jurisdiction of a homicide committed on a Belgian vessel lying within the waters of that State, such offense coming within the exception, in the treaty, of disorders disturbing public order in port or on shore.—*Mali Consul, etc. v. Keeper of Jail, etc.*, U. S. S. C., Jan. 18, 1887; 7 S. C. Rep. 385.

54. LANDLORD AND TENANT.—*Oral Agreement for Lease — Alterations in Buildings — Evidence — Statute of Frauds.*—In an action on an oral agreement for the conveyance of certain real estate, and for a lease of a hall by the defendant to the plaintiff, the defendant agreeing to put into the hall a hard-pine floor, where the statute of frauds is not pleaded, and it appears that the deeds and lease have been executed, and that the lease contains no

allusion to the agreement as to the floor, parol evidence is admissible to show it.—*Graffam v. Pierce*, S. J. C. Mass., Jan. 10, 1887; 9 N. E. Rep. 819.

55. LIMITATIONS—*Statute of—Conflict of Laws—Debt.*—R contracted a debt in Canada. Afterwards he removed to Nevada and there remained until an action would have been barred by the law of Nevada. He then emigrated to the Territory of Montana. *Held*, that the statute of limitations of Nevada constitutes no defense to an action brought against R in Montana.—*Chevrier v. Robert*, S. C. Mont., Jan. 11, 1887; 12 Pac. Rep. 702.

56. LUNATIC—*Inquisition Defective—Habeas Corpus.*—If, upon *habeas corpus* of a person adjudged insane, it appears that the jury who examined him failed to certify upon oath his insanity, he will be discharged.—*Territory ex rel. v. Sheriff*, S. C. Mont., Jan. 10, 1887; 12 Pac. Rep. 662.

57. MORTGAGE—*Deed Absolute—Release—Merger.*—A deed, though absolute on its face, is only a mortgage, when made to secure an existing debt. Though parties had undertaken to discharge a mortgage, equity will keep it alive to protect him against an intervening mortgage, of which he had no knowledge at the time.—*Hanlon v. Doherty*, S. C. Ind., Jan. 7, 1887; 9 N. E. Rep. 782.

58. NEGLIGENCE — *Proximate Cause — Misleading Instruction.*—A defective step to a caboose of a train is evidence of negligence of the company, and is the proximate cause of the fall and injury of a person attempting to use it. An instruction, assuming the existence of facts which are not proved, is misleading, and reversible error.—*Texas. etc. Co. v. Wiesener*, S. C. Tex., Nov. 12, 1886; 2 S. W. Rep. 667.

59. PARTNERSHIP — *Accounting — Pleading—Findings.*—In an action for an accounting between partners, based upon the alleged existence of a partnership which is denied by the defendant, the court may, in a trial without a jury, find facts which partly sustain the plaintiff's allegations of partnership, but show such a dissolution before action brought as would defeat a judgment in the plaintiff's behalf.—*Hart v. Finnigan*, S. C. Cal., Jan. 20, 1887; 12 Pac. Rep. 682.

60. PARTNERSHIP—*Dissolution and Account—Dismissal of Bill after Account.*—Where a partner files a bill against his copartners for a sale of partnership property, and for an account and obtains the sale, and, the account having been taken, the master finds the balance against complainant, the defendants acquire such an interest in the proceedings that the complainant cannot dismiss his bill against their objection; and the fact that one of the defendants did not answer the bill until after the motion to dismiss was entered, but before it was acted on, does not affect the case.—*Fisher v. Stovall*, S. C. Tenn., Jan. 10, 1887; 2 S. W. Rep. 567.

61. PATENT—*Infringement.*—It is no infringement of a patent for making separable and separated concrete blocks of pavement, to mark solid concrete pavement in squares, (apparent blocks) for ornament only, giving the pavement the appearance of being composed of blocks.— *California Artificial Stone-Paving Co. v. Schalicke*, U. S. S. C., Dec. 20, 1886; 7 S. C. Rep. 39.

62. ——— ——— A patent for gang-plows is not infringed by the use before the re-issue of a device contained in the re-issue and not claimed in the original patent.—*Newton v. Furst & Bradley, etc, Co.*, U. S. S. C., Dec. 13, 1886; 7 S. C. Rep. 369.

63. ——— ——— *Resweating Tobacco.*—A patent for resweating tobacco in wooden tanks is not infringed by resweating tobacco in boxes or cases in which the producer originally packs it.—*Sutter v. Robertson*, U. S. S. C., Dec. 26. 1886; 7 S. C. Rep. 376.

64. ——— *Novelty—Mechanical Skill.*—Patent No. 187,100 for making "improvements in cheese formers for making cider-presses," held void because there is in the device possessing only mechanical skill but neither novelty nor invention.—*Clark Pomace-holder Co. v. Ferguson*, U. S. S. C., Dec. 5, 1886; 7 S. C. Rep. 382.

65. PAYMENTS—*Application of—Secured and Unsecured Indebtedness.*—When no appropriation of payments by a debtor has been made by either party, the creditor cannot object to a decision applying the payments to the secured, rather than unsecured indebtedness, the former being undisputed in amount, and being prior in date to and bearing a higher rate of interest than the latter.—*Magarity v. Shipman*, S. C. App. Va., Jan. 20, 1887; 1 S. E. Rep. 109.

66. PLEADING—*Conspiracy to Defraud—Joinder of Causes of Action — Misjoinder—Election — Dismissal — Remedy.* — Where one charges a conspiracy to cheat him out of his land by obtaining possession, in his absence, of title papers and of lien notes executed for the purchase price of part of the land sold by him, he may in one action obtain relief against the several parties, including the surrender of the deeds and notes, the setting aside of adverse conveyances made during his absence, and judgment for enforcement of the lien notes. Under Civil Code Ky., § 85, providing that, in case of misjoinder of actions, where the plaintiff refuses to elect between them, the court may strike out the cause improperly joined, the court cannot dismiss the action for refusal to elect.—*Sheppard v. Stephens*, Ky. Ct. App., Jan. 15, 1887; 2 S. W. Rep. 548.

67. PLEADING—*Demurrer — Waiver.*—The right to demur is not waived by calling for a bill of particulars.—*Mulvey v. Staab*, S. C. N. Mex., Jan. 24, 1887; 12 Pac. Rep. 699.

68. PRACTICE—*Action — Abatement — Assignment of Chose in Action — Answer — Defense.*— An answer alleging an assignment of the cause of action by the plaintiff is not a defense, but an action may be dismissed on motion, if the defendant proves an assignment by the plaintiff, that the plaintiff has no beneficial interest in the cause of action, and that the bringing of the suit or its prosecution had not been authorized by the assignee. The assignee could ratify the bringing of the suit, or, on reassignment to him, the plaintiff could prosecute it for his own benefit.—*Moore v. Spiegel*, S. C. Mass., Jan. 10, 1887; 9 N. E. Rep. 827.

69. ——— ——— *Usury Paid Under Decree—Suit at Law to Recover.*—Gen. St. Ky. ch. 60, § 4, providing that excess of interest may be recovered from the lender, and ch. 71, art. 3, § 4, that such action must be brought in one year from payment, and the limitation shall apply to all payments made on all demands, *held*, as the debtor is not restricted to any particular *forum*, he may sue either at law

or in equity to recover usury paid under a decree in equity.—*Sherley v. Trabue*, Ky. Ct. App., Jan. 21, 1887; 2 S. W. Rep. 656.

70. —— *Appeal — Conflicting Testimony — Accounts.*—Upon a question involving accounts, when the evidence is conflicting, the upper court will not reverse the finding of the lower court unless the error is palpable.—*Magarity v. Shipman*, S. C. App. Va., Jan. 20, 1887; 1 S. E. Rep. 109.

71. —— —— *Evidence—Mortgage — Satisfaction* —When a appellate court finds and declares that evidence was properly rejected but also declares that if admitted it would not have affected the result, its error in so ruling is immaterial.—The acknowledgment of satisfaction by a mortgagee on the margin of the record authorizes the dismissal of an action to foreclose the mortgage.—*Ivinsen v. Hutton*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 403.

72. —— —— *Justice of the Peace—Extension of Time—Pub. St. Mass. Ch. 155, §§ 28, 29.* An appeal under Pub. St. Mass., *ch.* 155, §§ 28, 29, from the judgment of a trial justice, is not legally allowed and perfected, and will be dismissed, where it appears that, within twenty-four hours after judgment in an action, the plaintiff claimed an appeal, but the trial justice, being in doubt whether the plaintiff should recognize or give a bond, extended the time for perfecting the appeal "until such time as he should notify the plaintiffs to appear before him," it being shown that subsequently, upon notice, the plaintiff appeared and recognized with surety, but no notice was given to the defendant.—*Parker v. Snow*, S. C. Mass., Jan. 11, 1887; 9 N. E. Rep. 808.

73. —— —— *Harmless Error— Continuance— Evidence — Objections — Instructions —Record.*— When overruling of a motion for continuance causes no harm, the technical error will be disregarded. An objection to evidence for incompetency is insufficient. The record must show the action taken relative to instructions if error is assigned relative thereto.—*McKinsey v. McKee*, S. C. Ind., Jan. 11, 1887; 9 N. E. Rep. 771.

74. —— —— *Motion for New Trial—Record— Assignment of Error.*—Where the record fails to show a motion for a new trial upon grounds assigned in writing, no question is presented by an assignment, on appeal, of error in overruling the appellant's motion for a new trial; nor can any alleged error that is proper cause for a new trial be considered by merely assigning it as error in the supreme court.—*La Follette v. Higgins*, S. C. Ind., Jan. 12, 1887; 9 N. E. Rep. 780.

75. —— —— *Necessity for Bill of Exceptions— Continuance.*—The ruling of the court below, overruling a motion for a continuance, cannot be revised upon appeal, if the application makes a case for a first, but not for a second, continuance, in the absence of a bill of exceptions showing that it was the first application.—*Waites v. Osborne*, S. C. Tex., Nov. 9, 1886; 2 S. W. Rep. 665.

76. —— —— *Record—Bill of Exceptions—Long-Hand Manuscript of Reporter.*—The long-hand manuscript of evidence taken by a short-hand reporter, as it appears in a bill of exceptions, is, under section 1410, Rev. St. Ind. 1881, an original document incorporated therein; and original papers read in evidence, accompanying and properly identified by such long-hand report, may be treated as part thereof, and properly in the record, notwithstanding the general rule that original papers read in evidence cannot be certified and transmitted with the record to the supreme court, but must be copied in the bill of exceptions at some proper place.—*Ind., S. B. & W. R. Co. v. Quick*, S. C. Ind., Jan. 11, 1887; N. E. Rep. 788.

77. —— —— —— *Motion to Strike Out.*— Ruling sustaining a motion to strike out a pleading, which is not in the bill of exceptions or order of court, presents in question on appeal.—*Laverty v. State*, S. C. Ind., Jan. 11, 1887; 9 N. E. Rep. 774.

78. —— *Certiorari — Parties — Service — Extension of Time to Plead—Civ. Proc. Cal. § 1054.*— In *certiorari* in the superior court, the superior court was alone made defendant, but the alternative writ was served on the judges of the court and on the defendant in the case. *Held*, that the service was sufficient, and the proper parties were before the court, and *certiorari* was the appropriate remedy in such case. Extension of time to answer or demur is limited by the code to thirty days, and an order granting it until receipt of *remittitur* in another case pending on appeal is erroneous. Such order however can be modified by the supreme court on *certiorari*, and not necessary to determine whether the order was void.—*Baker v. Supreme Court of Shasta Co.*, S. C. Cal., Jan. 22, 1887; 12 Pac. Rep. 685.

79. —— —— *Remedy by Appeal—Appeal from Justice.*—*Certiorari* does not lie where there is a remedy by appeal. Want of jurisdiction on the part of a justice of the peace, to render a judgment, can be availed of upon appeal from the judgment.—*Alabama, etc. R. Co. v. Christian*, S. C. Ala., Jan. 26, 1887; 1 S. Rep. 121.

80. —— *Corporations — Insolvency — Rights of Stockholders — Creditors — Reference.*—A stockholder who is a creditor may file a bill in equity to wind up an insolvent corporation, and have all suits by creditors pending against it consolidated, and proper accounts taken for the settlement of its affairs; and other stockholders may show that the claim of the one filing the bill is not valid, although the bill was taken for confessed against the corporation. A reference not asked nor warranted by the pleading and proof, although confirmed without exception, will be set aside, if, on appeal, the order of reference is reversed.—*Crutchfield v. Mut. Gas-Light Co.*, S. C. Tenn., Oct., 1886; 2 S. W. Rep. 658.

81. —— *Costs — In Equity — Matter of Discretion.*—In a suit in equity, the matter of costs is in the discretion of the court, and it is not required to give costs to the prevailing party.—*Magarity v. Shipman*, S. C. App. Va., Jan. 20, 1887; 1 S. E. Rep. 109.

82. —— *Divorce—Advisory Verdict Set Aside — Rev. Stat. Mont., § 508—Appeal—Order Denying New Trial—Decree Presumed in Accord with Evidence.*— Under Rev. Stat. Mont., § 508, divorce cases are of chancery jurisdiction, and in such cases the decree must proceed from the chancellor, and verdicts or special findings, being advisory in such cases, may be approved or disregarded as the conscience of the chancellor may demand. On an appeal from an order denying a motion for a

new trial, there being no evidence before the appellate court, the judgment and decree below will be presumed to be supported by the evidence until the contrary appears.—*Beck v. Beck*, S. C. Mont., Jan. 5, 1887; 12 Pac. Rep. 694.

83. —— *Error, Writ of—How Taken.*— Where, after judgment for plaintiff below, defendant moved, in the lower court, for an order to remove the cause by writ of error to the supreme court, which was granted, and thereupon defendant procured a certified transcript of the record, and filed it in the supreme court, but no writ of error or citation was issued from the supreme court, and plaintiff entered only a special appearance there, *held*, that the supreme court did not acquire jurisdiction, and that the defect was not remedied by a stipulation filed in the lower court that the exhibits should be sent up without printing them.—*Chisum v. Ayers*, S. C. N. Mex., Jan. 20, 1887; 12 Pac. Rep. 697.

84. —— *New Trial—After Nonsuit—Appeal from Justice's Court.*— The superior court, after a nonsuit in the trial of an appeal from a justice's court, can grant a new trial. Code Civil Proc., § 980.—*Massman v. Superior Court*, S. C. Cal., Jan. 21, 1887; 12 Pac. Rep. 685.

85. —— —— *Judicial Discretion—Federal Courts.*— In federal courts, new trials are within the judicial discretion of the court, and its decision on that point is not matter for a bill of exceptions.—*Coleman v. Bell*, S. C. N. Mex., Jan. 8, 1887; 12 Pac. Rep. 657.

86. —— —— *Verdict against Evidence.*— A new trial will not be granted by the law court on motion, unless the verdict is so clearly against the weight of evidence that the jury were entirely unwarranted in finding the same.—*Byron v. Beal*, S. J. C. Me., Jan. 18, 1887; 7 Atl. Rep. 601.

87. —— *Recognizance—Sureties—Second Arrest.*—Sureties on a bail bond are relieved from liability by second arrest of their principal on same indictment and bail or his recognizance.—*Roberts v. State*, Tex. Ct. App. Oct. 23, 1886; 2 S. W. Rep. 622.

88. —— *Refusing to Give Proper Instructions—Law Given in Other Instructions.*—It is not error to refuse instructions asked, when the legal proposition of such instructions are embraced in others given.—*People v. Rogers*, S. C. Cal., Jan. 18, 1887; 12 Pac. Rep. 679.

89. —— *Set-off and Counterclaim—Money Advanced—Evidence.*—W. owning a tract of timber land, part of the timber being cut and corded, entering into a contract with R. to the effect that R should cut and cord the standing timber, and convert that, and the timber already cut, into coal, which W was to purchase; that W would advance to R fifty cents per cord to pay his choppers, and retain from the purchase price of the coal $1.50 per one hundred bushels to reimburse him for money so advanced. R went into possession, cut and corded timber, and W advanced money as agreed. A fire broke out in the coaling grounds, and destroyed the corded wood. *Held*, in an action by R against W for breach of contract, there being testimony tending to show the facts as above stated, that there is evidence in the case to support the plea of set-off for the money advanced by W, and that it was error to take the case from the jury and direct a verdict for the plaintiff.—*Woodstock Iron Co. v. Reed*, S. C. Ala., Jan. 14, 1887; 1 South. Rep. 116.

90. —— *Striking out Harmless Error—Parties.*— An order to strike out an answer although erroneous is harmless, if the same evidence is permitted that would have been if no such order had been made. The county is the proper defendant to an action on bonds issued for precincts by the county under the Nebraska statute of Feb. 15, 1869. *County of Nemeha v. Frank*, U. S. S. C., Jan. 17, 1887; 7. S. C. Rep. 395.

91. —— *Trial Open and Close—Rev. St. Tex. Art. 1299—Rules Court Tex. No. 31—Set-off.*— Under article 1299, Rev. St. Tex., providing that "the party having under the pleadings, the burden of proof on the whole case, shall be entitled to open and close the argument," and rule of court No. 31, providing that "the plaintiff shall have the right to open and conclude, both in adducing his evidence and in the argument, unless the defendant * * * shall, after the issues of fact are settled, and before the trial commences, admit that the plaintiff has a good cause of action, as set forth in the petition, except so far as it may be defeated * * * by the facts of the answer, * * * which admission shall be entered of record when the defendant * * * shall have the right to open and conclude both in adducing the evidence and in the argument of the cause," where the plaintiff sets up (1) the purchase of corn, and payment for it; (2) the failure of defendant to deliver it; (3) that there was forty and one-half bushels of the corn; (4) that it was worth $1.25 per bushel—he has the burden of proving each of these facts, and the admission, by the defendant, of all the others, but denial that the corn was worth $1.25 per bushel, does not give the defendant the right to open and close in adducing evidence or arguing the cause. A claim for the failure to deliver four and one-half bushels of corn alleged to be worth $1.25 per bushel, based upon a verbal contract of sale, is unliquidated in its nature, and subject to set-off by an unliquidated claim growing out of the breach of a different contract.—*Sanders v. Bridges*, S. Ct. Tex., Dec. 3, 1886; 2 S. W. Rep. 663.

92. PRACTICE—*Trial—Misstatement of Testimony by Presiding Judge—Rights of Parties—Positive and Negative Testimony.*—If a party would take advantage of the misstatement of testimony by the presiding judge in his charge to the jury, he must call the attention of the court to the fact before the jury retire. It is not error for the presiding judge, after explaining to the jury the difference between positive and negative testimony, to call attention to certain testimony as of a negative character.—*Knight v. Thomas*, S. J. C. Me., Jan. 13, 1887; 7 Atl. Rep. 538.

93. —— *New Trial—Trial by the Court—Error in Conclusions of Law.*—When a jury is waived in the trial of a cause, the parties, in effect, agree that the findings of fact of the court shall have the force of a verdict of a jury; but when it appears, on appeal, that the court erred, as by the admission of incompetent evidence materially affecting the case, or in the conclusions of law, the Supreme Court of Tennessee will set aside the judgment, and upon all the facts render such judgment as ought to have been rendered.—*Smith v. Hubbard*, S. C. Tenn., Jan. 10, 1887; 2 S. W. Rep. 569.

94. PROMISSORY NOTES—*Proof of Parol C ntem poraneous Agreement — Consideration.*— In an action on a promissory note, by the payee, or by one taking it with full knowledge of the facts, the maker may, by way of defense, prove a parol contemporaneous agreement that, though the face of the note showed a sum certain, the note having been given for the price of a stack of hay, if the value of such hay at a fixed price per ton did not amount to the face of the note, a rebate and credit was to be made in the maker's favor, of the difference between the actual value of the hay and the face of the note, and that, under such agreement, a less sum is due than that sued for; following former decision, 11 Pac. Rep. 385.—*Braly v. Heury*, S. C. Cal., Dec. 29, 1886; 12 Pac. Rep. 623.

95. RAILROAD COMPANIES — *Condemnation of Lands—Laying Tracks in Street — Damages.*— Where a company, incorporated for the purpose of affording terminal facilities, condemns a section of a parcel of land, and compensation is assessed, not only for the value of the section taken, but also for the other damages which the owner would sustain by the taking of it, the owner cannot claim further damages for injuries alleged to be caused by the laying of tracks on the sidewalk and bed of the street upon which the property abuts, for the purpose of connecting with the line of a railroad company, if the land was acquired for the purpose of laying a track upon it, and making the connection which was afterwards effected.—*Phipps v. Western, etc. R. Co.*, Md. Ct. App., Jan. 4, 1887; 7 Atl. Rep. 556.

96. RAILROAD COMPANIES—*Fences—Killing Stock Depot Grounds.*—Railroad companies are not required to fence their depot grounds, where the nature of their business is such as to make a fence not only inconvenient to them, but to the public as well: and they are not liable in damages for the death of animals which stray upon the track at such a place, and are, without negligence, killed by their trains.—*Indiana, etc. R. Co. v. Quick*, S. C. Ind., Jan. 11, 1887; 9 N. E. Rep. 788.

97. —— *Killing Stock—Burden of Proof—Jurisdiction of Justice.*—In a suit against a railroad company for killing stock, when it is shown that, where stock got on the track and was killed, the road was not securely fenced, the burden is on the company to prove it was not required to fence there. The complaint need not allege it occurred in that township, since in such cases the justice's jurisdiction is co-extensive with the county.—*Cincinnati, etc. R. Co. v. Parker*, S. C. Ind., Jan. 12, 1887; 9 N. E. Rep. 787.

98. —— *Injury to Stock—Extent of Presumption Under—Onus of Proof.*—The presumption of negligence established by the rule in Danner's Case, 4 Rich. 330, against railroad companies in actions for damages for the killing of stock on the track, upon proof by plaintiffs of their ownership and of the killing, is not restricted to cases where the defendant produces no testimony, and is not *ipso facto*, destroyed by the introduction by the company of testimony purporting to show the attendant facts and circumstances of the killing so as to throw the *onus* upon the plaintiff of proving negligence from the facts brought to light by such testimony, whether exculpatory or not, but the presumption continues to have controlling force until overthrown by defendant's making out affirmatively a case of due care or unavoidable accident.—*Joyner v. Sonth Carolina R. Co.*, S. C. S. Car., Jan. 4, 1887; 1 S. E. Rep. 52.

99.—REAL ACTION — *Conveyance Pending Suit—Pleading—Costs.*—If, pending a real action, the title to the land in question, and the right of possession pass from the plaintiff to the defendant, this fact may be pleaded in bar of the further maintenance of the suit, and if, upon this plea, the defendant prevails, he will be entitled to recover his costs incurred after, and the plaintiff will be entitled to his costs incurred before the filing of such plea.—*Leavitt v. Inhabitants, etc.*, S. J. C. Me., Jan. 18, 1887; 7 Atl. Rep. 600.

100. REPLEVIN—*Damages for Detention of Property.*—In an action of replevin of household furniture, where the verdict is for the defendant, and a return of the goods ordered, the jury may award such damages for the detention of the property as they shall be satisfied the property was worth to the defendant, during the time of the detention, considering the nature and character of the property.—*Boston Loan Co. v. Myers*, S. J. C. Mass., Jan. 17, 1887; 9 N. E. Rep. 805.

101. SALE—*Stoppage in Transitu—Termination of Right—Delivery.* — After the freight on goods transported by a railroad company had been paid by the consignee, and the goods receipted for, and left in the depot to be called for, the agent of the railroad company discovered, upon opening his mail, that he had instructions not to deliver them. *Held*, that it was too late to exercise the right of stoppage *in transitu*, and the goods were then subject to attachment by a creditor of the vendee. —*Langstaff v. Stix*, S. C. Miss., Jan. 10, 1887; 1 South. Rep. 97.

102. SCHOOLS AND SCHOOL-DISTRICTS — *Taxes—Injunction—Residents of Township—71 Ohio L. 187—Validity.*—Where suit was brought by the residents of a township to restrain the collection of a tax levied upon their property for school purposes, under an act of the general assembly, passed April 16, 1874 (71 Ohio L. 187), on the ground that the law is one of a general nature, and not uniform in its operation throughout the State, and there was no showing that the plaintiffs have not been, and are not now, availing themselves of the benefits of the school by sending their children to it, *held*, without deciding whether the law is or is not open to the objection urged, that it was too late afterwards to question the validity of the tax by such proceeding.—*Clarke v. Board of Education* S. C. Ohio, Jan. 11, 1887; 9 N. E. Rep. 790.

103. SEQUESTRATION—*Possession under Bond—Liability for Use—Pr. Code La. Arts. 280, 281.*— Articles 280, 281, Pr. Code La., provide that the bond on which possession is given shall, in the case of movable property, among other things, provide that the party shall not make an improper use of it, and, in the case of real property, that he shall make restitution of the fruits he shall have received since the demand. *Held*, that these articles implied that movables could be used, if used properly, and that no restitution for the use of such property was required.—*Baldwin v. Black*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 326.

104. SET-OFF AND COUNTERCLAIM—*Compensation.* —Under Civil Code La. art. 2507, *et seq.*, on "Com-

pensation" extinguishing, by operation of law' debts owed by two persons to each other, when liquidated and demandable, to the extent of their respective sums, prior liens paid by one sequestrating a vessel for a mortgage debt thereon, and a deficiency on execution sale thereunder, will extinguish, to the amount of their sum, a claim by the debtor, who owned the vessel, for her use by the libelant, who duly gave bond, and took her from the sheriff, pending the litigation.—*Baldwin v. Black*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep .326.

105. SET-OFF AND COUNTERCLAIM — *Evidence — Payment — Action in Tort—Counterclaim on Account.*—An action for damages for the wrongful issuance of an execution on a judgment against plaintiff but alleged by him to have been satisfied, and on account of the levy of such execution upon money of the plaintiff in the hands of the sheriff is founded in tort and the fact that plaintiff claims judgment only for the amount seized, with interest, does not alter its nature, defendant cannot, under the Montana statutes, set up by way of counterclaim an indebtedness upon an account. And if the payment of the judgment be denied, evidence of payment of sums of money to defendant's attorney, to be applied to the balance of the judgment, is admissible under the issue made by the denial.—*Davis v. Frederick*, S. C. Mont., Jan. 13, 1887; 12 Pac. Rep. 664.

106. TAXATION — *Collector's Fees — Act March 8, 1879 § 4—Rev. Act 1883, § 156.*—The act of March 8, 1879 § 4, fixing a collection fee at one per cent. of the amount paid for a liquor license was not repealed by section 150 of the revenue act of 1883, relating to the general subject of raising revenue.—*Zerger v. Quilling*, S. C. Ark., Jan. 15, 1887; 2 S. W. Rep. 662.

107. —— *License.*—Keeping for hire a pool-table *eo nomine*, is not a taxable occupation in Texas.—*Longenotti v. State*, Tex. Ct. App. Oct. 23, 1886; 2 S. W. Rep. 621.

108. TRUSTS — *Evidence to Establish —Pleading—Amendment During Trial Necessitating Continuance—Nonsuit — Plaintiff Entitled to Nominal Damages.*—A trust to purchase lands at tax sale, and restore them to their owner, is not established by an agreement, just before the time of redemption expired, to extend the period of redemption a month beyond the statutory limit. After a trial has been in progress several days, and the plaintiff had been fully advised early in the proceedings that the defendant considered the complaint defective, it is not an abuse of the court's discretion to refuse the plaintiff an amendment which, if granted, would have necessitated a continuance. Where, in an action to recover damages for breach of contract, no damages are proven, but a breach is established, the plaintiff is entitled to a judgment for nominal damages and costs, and it is error to a nonsuit.—*Hancock v. Hubbell*, S. C. Cal., Jan. 14, 1887; 12 Pac. Rep. 618.

109. TRUST—*Resulting Trust— Evidence—Declarations of Grantor.*—Evidence to establisah resulting trust must be so clear that there can be no well-founded doubt on the subject. And such a trust will not be declared after many years upon evidence of an understanding or general impression in the family. Nor is it the declaration of a grantor, made after he has parted with the title, admissible to establish such a trust.—*Crow v. Watkins*, S. C. Ark., Jan. 8, 1887; 2 S. W. Rep. 659.

110. VENDOR AND VENDEE — *Contract for Sale—Dependent Covenants*—Where, by a contract, a vendee agrees to pay for "all said property" on or before the expiration of a lease of same, and the vendor by the same contract agrees upon such payment to make to the vendee a deed, the covenants are dependent and concurrent, and the vendor cannot recover for non-performance by the vendee, unless he can show that, at the agreed time, he tendered the deed to the vendee.—*Powell v. Dayton, etc. Co.*, S. C. Oreg., Jan. 10, 1887; 12 Pac. Rep. 665.

111. —— *Oral Agreement—Price,*—L executed to a widow notes for $1,817.50, in which it was recited that the notes were given in consideration of a tract of land, and that they were to be void if a deed was not made to the land. The land was owned by the widow's children, and she had only a dower estate in it. It was agreed that the widow should have the land sold by the circuit court. This was done, and the land was bought by L for $1,460. *Held*, in an action on the notes by the widow, that she was entitled to recover the amount of the notes, less a credit of $1,460.—*Smith v. Meek*, Ky. Ct. App., Jan. 15, 1887; 2 S. W. Rep. 650.

112. —— *Vendor's Lien—Identification of Notes.*—A deed of one hundred acres of land in the Lucilla Gonzales survey, recited, as part of the consideration for it, two notes for $325 each, payable upon certain dates named. After the land had passed into the hands of a subsequent purchaser, it was attempted to subject it to the payment of three notes, one for $325 and the others for $45 and $80, respectively; all reciting that they were given for one hundred acres of land in the Lucilla Gonzales survey, and corresponding, except as to the amounts of the two latter, to the notes recited in the deed. *Held*, that the note for $325 could be enforced against the land, but not the others, without further evidence that they were given for the land sought to be subjected.— *Waites v. Osborne*, S. C. Tex., Nov. 9, 1886; 2 S. W. Rep. 665.

113. WILL — *Investment for Life Tenant — Fund Intact.*—Where, under a will, trustees are to purchase bonds and to pay over income to legatees, the whole income must be paid over without deduction to make good to remainder over the premium paid for the bonds.—*Shaw v. Cordis*, S. J. C. Mass., Jan. 13, 1887; 9 N. E. Rep. 794.

114. WILL—*Undue Influence—Evidence—Plaintiff's Belief in Issue—Devising Another's Property—Facts Unknown to Plaintiff Proving Point Conceded—Witness—Impeachment — Petition — Part Admissible—Re-examination.*—Where the issue is whether the plaintiff honestly and reasonably believed a will to be the product of undue influence, *held*, (1) that evidence that the testator attempted to devise property not his own is admissible; (2) that evidence of facts unknown to the plaintiff, to show there was no undue influence, is not admissible; and (3) that evidence to show that there was no undue influence is not admissible when the plaintiff concedes that there was none. Where a party testified differently from what he testified in a former trial, and stated in his petition for a new trial, such petition is admissible to impeach him; and such part only as is pertinent to the issue need

be offered in evidence. Where a witness is interrupted in his answer by a cross-examining counsel, he may complete it on re-examination.—*Bellows v. Sowles*, S. C. Vt., Jan. 20, 1887; 7 Atl. Rep. 542.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

Query No. 10. "A grant by deed is made to A and B, his wife, and *her* heirs and assigns, forever." What estate does B take in the land? H.

Query No. 11. A, a non-resident of Kansas, obtains a judgment in Kansas against B, who is a resident of the State. An execution is issued thereon; a tract of land in which B never had any title, or even an equity, is levied on and sold, bought for A by his attorney, the sale confirmed, a deed to A executed and placed on record. A afterwards acquires a tax-title to the same tract of land. Does he obtain any title by virtue of such tax title? Cite authorities, if any. M.

QUERIES ANSWERED.

Query No. 1. [23 Cent. L. J. 23.] A, a country wood dealer, goes to B, a city wood and coal dealer, and asks B whether he wants to buy a car-load of wood. B answers "yes." A says, "I will ship a car-load to you and have it put on your side-track." A then orders of B a load of coal, and says to B, "you can take your pay out of the wood; you can put it in the account against the wood." B delivers the coal, and the car-load of wood comes in and is put on his side-track. A then refuses to sell the car-load of wood to B. Has B a lien on the car-load of wood for the coal which he delivered to A, who is utterly irresponsible? H.

Answer. Under the terms stated in the query, the contract was completely executed and nothing remains to be done. A has sold the car-load of wood to B, who has paid for it in part, or altogether, by a load of coal. Both commodities having been delivered, nothing remains except to collect the balance due. If the coal was worth more than the wood, A owes B the difference, and *vice versa*. A cannot refuse to sell the wood to B, because he has already done so, and B has no lien on the wood, because it is his own property. H.

RECENT PUBLICATIONS.

THE AMERICAN REPORTS, Containing all Decisions of General Interest Decided in the Courts of Last Resort of the Several States, with Notes and References, by Irving Browne. Vol. LV, Containing all Cases of General Authority in the Following Reports: 45 Arkansas; 46 Arkansas; 53 Connecticut; 113 Illinois; 114 Illinois; 105 Indiana; 106 Indiana; 66 Iowa; 34 Kansas; 37 Louisiana Annual; 141 Massachusetts; 58 Michigan; 85 Missouri; 102 New York; 94 North Carolina; 28 South Carolina; 27 West Virginia. Albany: John D. Parsons, Jr., Publisher. 1886.

We have reviewed several of the predecessors of this volume, and can do little more now than reiterate our former judgments. The truth is, the character of this standard collection of select cases is so firmly established, and its merits so fully appreciated by the profession that commendation is as superfluous, as disparagement would be innocuous. We can only add that we observe that, in this volume, the learned reporter continues to append to the more important cases the annotations which have heretofore added so much to the value of the collection.

AN ANALYTICAL DIGEST of the Law and Practice of the Courts of Common Law, Divorce, Probate, Admiralty and Bankruptcy, and of the High Court of Justice and the Court of Appeal of England, comprising the Reported Cases from 1756 to 1786, with References to the Rules and Statutes Founded on the Digests of Harrison and Fisher. By Ephraim A. Jacob, of the New York Bar. Vol. XI. Supplement 1883, 1886: New York Digest Publishing Co., Publishers, 320 Broadway, New York. 1886.

This is a continuation of Mr. Jacob's well known digest of the English reports, founded upon the digests of Harrison and Fisher. The volume before us contains abstracts, evidently prepared with great care, covering the period between 1883 and 1886, and including the decisions of the appellate courts and the subordinate courts of common law, divorce, admiralty, probate and bankruptcy. The volume is evidently valuable, as affording access to the very latest decisions of English courts upon a great variety of subjects of interest to the American as well as to the English lawyer. The volume is well printed and gotten up in uniformity with its predecessors of the series.

JETSAM AND FLOTSAM.

ALL ABOUT A RAT.—A rather curious case will shortly be heard before the tribunal of a German town, the original cause of which is a rat. It seems that some time ago the house of an inhabitant of the town was invaded by a number of rats, and to get rid of them the following stratagem was resorted to. The inmate of the house caught one of the intruders, tied a string of little bells round its neck, and let it go. The rat, on regaining its liberty, went to rejoin its fellows, but the latter, scared by the jingling of the bells, fled from the house, and sought domicile elsewhere. As for the one with the bells attached, it chose a neighboring house for its abode, and it was this that led to the present lawsuit. The inmate of the house was awaked one night by the mysterious jingling of a bell, and unable to account for the sound, he spoke about the matter to his family and household. The worthy people were extremely superstitious, and when on several succeeding nights the tinkling of bells was distinctly heard by everyone, the only conclusion that could be reached was that the house haunted. Under this impression the servants quitted their places, their mistress fell ill; in fact to the peace and tranquillity that had formerly reigned succeeded terror and alarm. Ultimately it chanced that the "ghost"—that is to say, the rat—was caught, and upon the muck-tormented family learning who had belled the creature, it was decided to bring an action against him to obtain compensation for all the worry his stratagem had occasioned his neighbors.